Appendix A—Opinion of The United States Court of Appeals for the Eleventh Circuit Dated and Decided February 5, 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-10143-FF

JEFFREY J. THOMPKINS,	) Case No. 02-61161-) CIV-MORENO/) GARBER
Plaintiff-Counter-Defendant-Appellant	)
	) **PUBLISHED**
vs.	) **DECISION**
LIL' JOE RECORDS, INC., LIL' JOE WEIN MUSIC, INC., JOSEPH WEINBERGER, and JOHN DOE INDIVIDUALS and CORPORATIONS 1-5,	)
Defendants-Counter-Claimant-Appellees,	)
NAVARRE CORPORATION,	)
Third Party Defendant.	)

On Appeal from the United States District Court for the Middle District of Georgia

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FEBRUARY 5, 2007.

[1]Before TJOFLAT and KRAVITCH, Circuit Judges, and LAWSON,* District Judge.

TJOFLAT, Circuit Judge,

This appeal requires us to consider what happens when a debator-in-possession in a Chapter 11 bankruptcy case, who negotiated the purchase of copyrights prior to the bankruptcy proceeding, later uses the bankruptcy code to reject those contracts that transferred ownership of the copyrights to the debtor. Our resolution of that question determines the outcome of much of this suit by a rap artist who created the works giving rise to the copyrights in question. The artist sold copyrights in his works to a music recording company in exchange for a recording contract that entitled the artist to future royalties. The recording company later went bankrupt, becoming the debtor-in-possession. In confirming the debtor's reorganization plan, the bankruptcy court ordered that all of the debtor's contracts with the artist be rejected under the bankruptcy code and the copyrights sold to a rival recording company and its owner, two of the defendants in the instant case.

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* Honorable Hugh Lawson, United States Chief District Judge for the Middle District of Georgia, sitting by designation.

Years later, the artist sued the defendants, alleging that they did not actually gain ownership of the copyrights through the bankruptcy, or if they did, they now owe him royalties. Based on that premise, the artist asserts numerous claims sounding in federal and state law. The district court gained summary judgment in favor of the defendants on all claims, and for the reasons set forth below, we affirm.

I.

The pertinent facts span a period of seventeen years. We recount first the history of the artist's business dealings with the debtor-in-possession, then the bankruptcy court's administration of the debtor's reorganization, and finally the proceedings leading to this appeal.

A.

Jeffrey J. Thompkins ("Thompkins") is a rap artist who performs individually under the name "JT Money." As teenagers in the late 1980s, Thompkins and a partner were discovered at a Miami talent show by a member of the somewhat notorious South Florida-based rap group 2 Live Crew. Another member of 2 Live Crew, Luther Campbell ("Campbell"), owned a number of variously named record labels and was in the business of developing new artists. In May 1989, Campbell signed Thompkins to an Exclusive Recording Agreement (the "1989 Agreement" or "Agreement") with a predecessor company to Campbell's Luke Records, Inc. ("Luke Records").[1] Under the 1989 Agreement, Thompkins would record albums under the

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1The predecessor company that signed Thompkins was Effect Records, a division of Campbell's Skyywalker Records (which later became Luke Records). These and all of Campbell's other various music business entities relevant here ultimately fell under the ownership of Luke Records or Campbell individually. For ease of reference, we refer collectively to all of the Luke Records and Campbell music recording and publishing entities as "Luke Records."

group name "Poison Clan."[2]

The Agreement covered a contract period of five years. Under its terms, Thompkins was required to record and deliver master recordings ("masters") for production and release by Luke Records. Luke Records was given "exclusive, unlimited and perpetual rights throughout the world" to the copyrights "in sound recordings (as distinguished from the musical compositions embodied thereon) recorded by ARTIST during the Term." Thompkins also granted Luke Records a license for "[a]ll musical compositions or material recorded pursuant to this Agreement which are written or composed . . . or which are owned or controlled, directly or indirectly, in whole or in part, by ARTIST and/or . . . any producer of the masters subject hereto."[3] In exchange for its ownership of the sound recording copyrights and its license to exploit the musical compositions, Luke Records agreed to pay Thomkins royalties according to specified rates. The Agreement obligated Luke Records generally to "commercially release each LP [album] recorded and delivered" by Thompkins under certain conditions, but specified:

> [Thompkins] acknowledges that the sale of records is speculative and agrees that the judgment of [Luke

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2 "Poison Clan" originally referred to both Thompkins and his original partner, Patrick Watler. Thompkins and Watler were both parties to the 1989 Agreement, but in July 1992, Watler apparently decided to perform with a different group and signed a letter purporting to release any interest he had in Poison Clan. Watler's involvement with Poison Clan is not at issue here.

3 Thompkins also obliged himself to obtain a license on Luke Records' behalf for any compositions that Thompkins did not himself own or control.

> Records] with regard to any matter affecting the sale, distribution or exploitation of such records shall be binding and conclusive upon [Thompkins]. Except [for the general provision requiring Luke Records to release completed albums], nothing contained in this Agreement shall obligate [Luke Records] to make, sell, license, or distribute records manufactured from masters delivered hereunder.

In addition to the 1989 Agreement, the validity of which neither party disputes on appeal, the record contains a number of other document that appear to be contracts between Thompkins and various parties. Several of these suggest that, after the 1989 Agreement was signed, Thompkins in fact signed away to Luke Records all or part of his copyrights in the musical compositions embodied on his albums.[4] Among these documents is an addendum to the 1989 Agreement, dated February 1992 (the "1992 Addendum" or "Addendum"), transferring to Luke Records "an undivided 50% of the publishing interest, in all compositions of [Thompkins] including without limitation, the copyrights therein and all renewal and or [sic] extensions throughout the world." In exchange, the Addendum recites that tHompkins is to receive, among other things, cash advances for each album and the entire royalty to which Poison Clan was entitled under the 1989 Agreement regardless of any future addition of other members to the group. Thompkins signed the Addendum, which also has an unsigned blank for a signature on behalf of Luke Records

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4 Some of these purported agreements were technically between Thompkins and Pac Jam Publishing ("Pac Jam"), Campbell's music publishing company. Pac Jam was also disposed of as part of the Campbell bankruptcy, so we include it when we refer to "Luke Records."

"By: Luther R. Campbell, President."

Other documents pertain to Thompkins's work as a "sideman" on certain compositions and recordings created by Campbell, who performed as a solo artist in addition to performing with 2 Live Crew and managing his music production business. These one-paragraph letter agreements ("the Sideman Agreements") set forth Thompkins's compensation for his contributions to certain of Campbell's solo works.[5] In slightly different language, each of the Sideman Agreements provides that the specified royalty rate and/or lump sum payment represents Thompkins's payment in full for his services on the listed songs and that he "will receive no other royalties" or "no other monies." The Sideman Agreements do not explicitly reference the ownership of any copyrights in these works.

From 1989 through 1994 (the year in which the 1989 Agreement expired by its terms), Thompkins recorded three albums as Poison Clan: 2 Low Life Muthas, Poisonous Mentality, and Rufftown Behavior. Luke Records distributed each of these.

B.

On March 28, 1995, Luke Records became the subject of an involuntary Chapter 7 bankruptcy petition filed by its creditors in the U.S. Bankruptcy Court for the Southern District of Florida. That June, Campbell individually filed a voluntary Chapter 11 bankruptcy petition, and Luke Records moved to convert its Chapter 7 case into one under Chapter 11. The bankruptcy court granted Luke Records' motion on

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5 The Sideman Agreements are dated April 27, 1990; December 1, 1991; May 21, 1992; and February 11, 1994. Each covers between one and four songs by Campbell.

June 14, 1995 and jointly administered the Luke Records and Campbell bankruptcies.[6]

On November 22, 1995, Thompkins filed a proof of claim in the Luke Records bankruptcy for an unspecified amount owed to Poison Clan based on "Services performed" and "Royalties Due - Record & Copywright [sic]" from the period "1989 to 1994." In deposition testimony taken in the course of the instant case, Thompkins admitted that the address he listed on the proof of claim form was his residence at the time and that he did, in fact, receive notices at that address regarding the bankruptcy case.[7]

The bankruptcy cases continued throughout the following months, and by mid-February 1996, Luke Records, Campbell individually, and the Official Unsecured Creditors' Committee in the Luke Records bankruptcy had tentatively agreed upon a Joint Plan of Reorganization (the "Joint Plan" or "Plan") for the two debtors. The Joint Plan provided for the classification and treatment of all claims in both bankruptcies, specifying that after confirmation by the bankruptcy court, "all of the provisions of this Plan,

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6 Although the bankruptcy court administered the two cases jointly, they were maintained as separate cases on the bankruptcy court docket. The two case designations were In re Luke Records, Inc., No. 95-11447 (Bankr. S.D. Fla.), and In re Luther Campbell, No. 95-12785 (Bankr. S.D. Fla.).

7 On February 12, 1996, the Official Unsecured Creditors' Committee in the Luke Records bankruptcy filed an objection to various claims, including Thompkins's. The committee asserted that Thompkins's unliquidated claim was "pursuant to [an] executory contract" and should be "disallowed and held in abeyance" pending Luke Records' decision on whether to accept or reject executory contracts. There is no evidence in the record that Thompkins responded to the committee's objections or took any other action with regard to the bankruptcy cases.

including all appendices and other exhibits hereto, shall be binding on the Debtor, the Estate, all Creditors, and all other entities who are affected (or those interests are affected) in any matter by the Plan." A Letter of Intent annexed as "Exhibit A" to the Joint Plan specified the proposed terms of the Plan's execution.

Under the Letter of Intent, the various Luke Records entities (including Luke Records, Inc., Pac Jam, and Campbell individually) proposed to convey a number of specified assets to Lil' Joe Records, Inc. And its owner, Joseph Weinberger ("Weinberger"). The assets were to be transferred "free and clear of any and all liens, claims, encumbrances, charges, setoffs or reoupments of any kind, except as noted hereinbelow." The assets to be conveyed included "a[ll] worldwide rights to the masters . . . owned or controlled by Luther Campbell or Luke Records" and "[a]ll worldwide copyrights and/or publishing interests held by Luther Campbell, Luke Records, Inc., or Pac Jam Publishing," except with regard to certain other artists not at issue here. Under the Agreement, Campbell and Pac Jam would "receive no royalties, whether as artists, producer, writer, publisher, or in any other capacity, on any of the masters or compositions being sold." In exchange, Lil' Joe Records, Inc. and Weinberger agreed to pay a total of $800,000 to the two bankruptcy estates.

The Joint Plan and Letter of Intent also provided for the disposition of executory contracts to which Campbell or Luke Records were parties. The Joint Plan established as a default that any executory contracts not otherwise explicitly disposed of were to be deemed rejected pursuant to 11 U.S.C.

§ 365 (again, with certain exceptions not relevant here).[8] The Letter of Intent proposed that "Luke Records . . . shall assume and assign to [Lil' Joe Records, Inc. And Weinberger], in [Weinberger's] sole discretion, . . . all existing artist and producer contracts to which Luke Records or its affiliates and subsidiaries is a party with Poison Clan." (Emphasis added.) Both the Joint Plan and the Letter of Intent provided that their terms were subject to an order of confirmation by the bankruptcy court.

In the interim between the filing of the Joint Plan and the bankruptcy court's confirmation order, the disposition of executory contracts remained an unresolved issue in the bankruptcy. On February 16, 1996 - the same day on which the Joint Plan was filed - Luke Records filed a motion pursuant to 11 U.S.C. § 365 to determine its ability to assume and assign various contracts it characterized as executory, including "Debtor's Exclusive Recording Agreement with: Poison Clan." According to the motion, "[a] material provision of [the Joint Plan and Letter of Intent] will be the assumption and ultimate assignment of the executory

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8 Section 365 provides in relevant part that "the trustee, subject to the court's approval, may assume or reject any executory contract . . . of the debtor. . . . [T]he rejection of an executory contract . . . of the debtor constitutes a breach of such contract . . . immediately before the date of the filing of the petition[.]" 11 U.S.C. § 365(a), (g). Although the statute speaks of assumption or rejection by "the trustee," decisions to assume or reject executory contracts under § 365 may also be made by a debtor-in-possession by operation of 11 U.S.C. § 1107(a), which generally authorizes debtors-in-possession to perform the same functions as a trustee. Sipes v. Gen. Dev. Corp. (In re Gen. Dev. Corp.), 177 B.R. 1000, 1011 (S.D. Fla. 1995), aff'd sub nom. Sipes v. Atl. Gulf Cmtys. Corp. (In re Gen. Dev. Corp.), 84 F.3d 1364, 1365, 1373–74 (11th Cir. 1996). It appears that in both the Luke Records and Campbell bankruptcies, the debtors were operating under § 365 as debtors-in-possession.

contracts described" to Lil' Joe Records, Inc. And Weinberger. Apparently, however, in the weeks that followed, Weinberger thought better of that aspect of the Plan, opting instead to exercise the discretion given to him in the Letter of Intent and direct Luke Records to reject the contracts. On March 21, 1996, the bankruptcy court entered an order withdrawing without prejudice Luke Records' motion to assume and assign the contracts; setting the confirmation hearing date as the intended deadline for any other motions to assume executory contracts; and reiterating that "[a]ny contracts not assumed will be deemed rejected."

On March 22, 1996, the bankruptcy court approved and confirmed the Joint Plan and Letter of Intent, ordering that "the parties are authorized and directed to perform thereunder" ("the Confirmation Order"). The order recites various findings required for plan confirmation under 11 U.S.C. § 1129, including that the Joint Plan was proposed in good faith, that it compiled with the applicable provisions of the bankruptcy code, and that "[t]he sale of Debtor's assets to Joseph Weinberger and Li'l Joe Records, Inc. . . . pursuant to the terms of the Plan and the Letter of Intent is in the best interest of each of the Debtor's estates. . . . [Weinberger and Lil' Joe Records, Inc. are] independent third-party purchaser[s] and the Letter of Intent was negotiated in good faith and at arms'-length." Among its specified mandates, the Confirmation Order provides:

> [A]ll executory contracts and unexpired leases of the Debtors are hereby rejected pursuant to Section 365(a) of the Bankruptcy Code. Parties to such rejected contracts and leases are directed to file proofs of claim for rejection damages . . . or be forever barred from asserting such claims. . . . All of the assets to be transferred under the Plan, the Letter of

> Intent or this Order shall . . . be transferred free and clear of any interest in such property of an entity that the Debtors.

Following the plan confirmation, the bankruptcy court issued orders in both bankruptcy cases setting bar dates for claims arising from rejected executory contracts. The order in the Luke Records bankruptcy, issued on April 4, 1996, provided that "[a]ll of the Debtor's executory contracts . . . , including those exclusive recording contracts known to the Debtor shown in Exhibit 'A' attached hereto and incorporated herein by reference . . . are rejected." The first artist listed on "Exhibit A" was Poison Clan. Parties to the rejected contracts were allowed thirty days to file "any claims arising as a result of such rejection," and claims not timely filed were to be "deemed waived and will not be entitled to distribution under the confirmed Joint Plan." Thompkins did not file any proof of claim for rejection damages.

As a final step in the reorganization process, the parties executed the various transactions required under the Plan. Among these was a copyright assignment to Lil' Joe Records, Inc. of "all of [Luke Records', Campbell's and Pac Jam's] portion of all rights, title and interest set forth in and to the musical compositions, comprising 100% of all worldwide rights owned by [Luke Records, Campbell and Pac Jam] . . . including but not limited to the lyrics, music, and title of the compositions, and any and all works derived therefrom, together with the copyrights and proprietary rights therein." The copyright assignment was executed on April 8, 1996.

C.

Nearly six years later, on March 5, 2002, Thompkins filed the instant suit against Lil' Joe Records, Inc., Lil' Joe

Wein Music, Inc., and Weinberger 9hereinafter collectively, "Lil' Joe") in the U.S. District Court for the Northern District of Georgia seeking damages, declaratory relief, and permanent injunctive relief for alleged violations of the Copyright Act, 17 U.S.C. § 501, Lanham Trademark Act, 15 U.S.C. §§ 1114, 1125, and state common law contract claims. Later that year, the case was transferred to the Southern District of Florida, where Thompkins filed an amended complaint on November 7, 2002 adding a claim of fraud under Florida common law. The parties conducted discovery and filed opposing motions for summary judgment. On March 16, 2004, after a hearing on the motions for summary judgment, a magistrate judge issued a report and recommendation that both motions be denied. Lil' Joe objected to the magistrate report. On December 7, 2004, the district court declined to adopt the report, granted Lil' Joe's motion for summary judgment on the ground that the earlier bankruptcy Confirmation Order precluded Thompkins's claims, and denied Thompkins's motion for summary judgment. The district court entered final judgment for Lil' Joe on December 16, 2004. Thompkins now appeals, challenging the district court's order granting Lil' Joe's motion for summary judgment.

II.

We review de novo a grant of summary judgment, applying the same standard as the district court and reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party. Calhoun v. Lillenas Publ'g, 298 F.3d 1228, 1232 (11th Cir. 2002). Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The district court granted summary judgment in favor of Lil' Joe on the ground that the bankruptcy court's Confirmation Order precluded all of Thompkins's claims in the district court. Neither the parties not the district court, however, refer to the precedent of this circuit governing the preclusive effect of bankruptcy orders in subsequent collateral litigation. See, e.g., Eastman Kodak Co. v. Atlanta Retail, Inc. (In re Atlanta Retail, Inc.), 456 F.3d 1277 (11th Cir. 2006); Kaiser Aerospace & Elecs. Corp. v. Teledyne Indus., Inc. (In re Piper Aircraft Corp.), 244 F.3d 1289 (11 th Cir. 2001); Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd), 898 F.2d 1544 (11 th Cir. 1990). We think it less than clear whether the Confirmation Order precludes altogether Thompkins's claims in this case, but we find it unnecessary to enter that thicket in our review. The essence of the parties' quarrel on appeal is how certain assets were disposed of in the bankruptcy; both Thompkins and Lil' Joe now contend that the bankruptcy reorganization gave them ownership over these assets or other collateral rights. Although both parties couch their arguments in terms of "res judicata," their dispute is not simply whether Thompkins's claims were precluded before he even came through the courthouse door to file the instant complaint. Instead, this case depends upon the substance of the bankruptcy reorganization of Luke Records.

Accordingly, we decline to re-examine the grant of summary judgment on preclusion grounds, but we consider instead the merits of the parties' respective arguments, as we may do in our review on appeal. See Lucas v. W. W. Grainger, Inc., 257 F.3d 1249, 1256 (11 th Cir. 2001) (holding that a judgment can be affirmed on appeal "on any ground that finds support in the record," including alternate grounds for summary judgment (quoting Jaffke v. Dunham, 352 U.S. 280, 281, 77 S. Ct. 307, 308, 1 L. Ed. 2d 314

(1957)). In the sections that follow, we examine each of Thompkins's claims or related group of claims under the Copyright Act, the Lanham Act, Florida contract law, and Florida tort law of fraud, respectively.[9]

III.

A.

Thompkins first asserts a claim of infringement under the Copyright Act, 17 U.S.C. § 501,[10] alleging that Lil' Joe has illegally exploited copyrights owned by Thompkins in dozens of songs that he authored and performed on recordings.[11] Thompkins created and performed these

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9 Thompkins's amended complaint includes nine enumerated counts. Among them are claims entitled "Injunction" and "Attorney's Fees, Costs & Punitive Damages." These are clearly remedies and costs to which Thompkins is only entitled if he prevails; they are not causes of action in and of themselves. See, e.g., Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1097-98 (11 th Cir. 2004) ("[I]f the plaintiff's rights have not been violated, he is not entitled to any relief, injunctive or otherwise."). The seven remaining actionable counts are pled as: "Violation of Copyright Act," "Violation of Lanham Act," "Breach of Contract," "Unjust Enrichment," "Promissory Estoppel," ":Rescission and Restitution," and "Fraud." Because the breach of contract, unjust enrichment, promissory estoppel and rescission claims all rely on Florida law generally pertinent to contracts, we treat those claims together.

10 17 U.S.C. § 501(a) provides, "Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 . . . is an infringer of the copyright[.]"

11 The specific songs for which Thompkins claims copyright ownership are listed by name in the mandatory initial disclosures that he filed in support of his original complaint in the Northern District of Georgia, and to which his amended complaint refers. Oddly, the record contains no single piece of evidence compiling all the works in question and explicitly indicating which specific titles were covered by which contracts

compositions either for his Poison Clan records under the 1989 Agreement ("the Poison Clan Songs") or in collaboration with Luther Campbell for use on records Campbell released as a performer ("the Campbell Songs"). We examine separately the copyright claims on the Poison Clan Songs and the Campbell Songs.

1.

With regard to the Poison Clan Songs, Thompkins argues that any copyrights he transferred to Luke Records under the 1989 Agreement reverted to his ownership when Luke Records rejected the Poison Clan contracts as executory under the bankruptcy Joint Plan.[12]

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between Thompkins and Luke Records. This information is obviously relevant to determining the ultimate ownership of the copyrights in the various songs.

In our review of the piecemeal record, we are able to conclude that the songs listed on Thompkins's initial disclosures fall into four categories: (1) songs that were released on the first Poison Clan album, 2 Low Life Muthas; (2) songs that were released on the second Poison Clan album, Poisonous Mentality; (3) songs that were released on the third Poison Clan album, Rufftown Behavior; and (4) songs that were released on records by Luther Campbell as a performer, with Thompkins performing in a "sideman" capacity. All of the first three categories of songs are covered by the 1989 Agreement, as those songs appeared on albums produced under Thompkins's initial recording contract with Luke Records. The fourth category, discussed in greater detail at part III.A.2., infra, is covered by the Sideman Agreements; the record contains no evidence of any other contractual agreements governing the rights to the songs in this category.

12 We pause for a moment here to make clear what "copyrights" are at issue with regard to the Poison Clan Songs. Lil' Joe contends that under the confirmed Joint Plan, it came to own copyrights in both the sound recordings and the musical compositions of the Poison Clan Songs. As to the former, there is no dispute that Luke Records received the copyrights

to the sound recordings under the 1989 Agreement. Thus, to the extent that Lil' Joe acquired Luke Records' assets through the reorganization - which we discuss in the text following this note, infra - Lil' Joe would unquestionably have gained ownership of the sound recording copyrights in the Poison Clan Songs.

As to the latter, Lil' Joe's claim to ownership of the musical composition copyrights is based on Thompkins's assignment of all or part of those copyrights to Luke Records via two sets of documents: the 1992 Addendum to the 1989 Agreement, and/or a series of "songwriter agreements" executed during the term of the 1989 Agreement and purportedly transferring one hundred percent of Thompkins' composition copyrights in dozens of individual songs on the three Poison Clan albums. Thompkins disputes the validity of the 1992 Addendum and the songwriter agreements, arguing that Luke Records (and thus, Lil' Joe) never came to own any part of the composition copyrights.

We need not consider the songwriter agreements, for the 1992 Addendum sufficiently establishes that Luke Records owned half of the musical composition copyrights in the Poison Clan Songs. The 1992 Addendum by its terms transferred fifty-percent ownership of the composition copyrights to Luke Records. To the extent that Lil' Joe acquired Luke Records' assets through the bankruptcy, Luke Records' half-ownership would have transferred to Lil' Joe. This is significant because, if Lil' Joe is now a co-owner of the composition copyrights (in addition to being full owner of the sound recording copyrights), Thompkins cannot maintain his suit for infringement. See Quintanilla v. Tex. Television Inc., 139 F.3d 494, 498 (5th Cir. 1998) ("A co-owner of a copyright cannot be liable to another co-owner for infringement of the copyright." (quoting Oddo v. Ries, 743 F.2d 630, 632–33 (9th Cir. 1984))); Zuill v. Shanahan, 80 F.3d 1366, 1369 (9th Cir. 1996) (same); cf. MCA Television Ltd. v. Pub. Interest Corp., 171 F.3d 1265, 1275 (11th Cir. 1999) (applying a similar principle that exclusive licensees of copyrights cannot be liable for infringement).

Thompkins attempts to disclaim the 1992 Addendum, alleging that it is invalid because it "was not executed by any representative of

Thompkins further argues that, upon reversion of the copyrights, those assets ceased to constitute part of the bankruptcy estate and thus were not transferred to Lil' Joe under the Joint Plan, notwithstanding the language of the Plan and the various supporting documents and bankruptcy orders suggesting that the copyrights were meant to be transferred. Accordingly, Thompkins argues, Lil' Joe infringed his copyrights when it exploited them after the plan confirmation. Lil' Joe disputes Thompkins interpretation of

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Luke [Records]" and for failure of consideration. As a matter of law, these arguments are insufficient to free Thompkins from his obligations under the contract. See Diaz v. Rood, 851 So. 2d 843, 846 (Fla. 2d Dist. Ct. App. 2003) ("It is clear that a promise, no matter how slight, can constitute sufficient consideration so long as a party agrees to do something that they are not bound to do." (internal quotations omitted)); Dodge of Winter Park, Inc. v. Morley, 756 So. 2d 1085, 1085–86 (Fla. 5th Dist. Ct. App. 2000) ("Generally, it is enough that the party against whom the contract is sought to be enforced signs it."); Skinner v. Haugseth, 426 So. 2d 1127, 1131 (Fla. 2d Dist. Ct. App. 1983) (same). Thompkins does not dispute the authenticity of his signature or claim that he expressly intended that the Addendum only be valid upon signatures of all parties. Furthermore, the Addendum itself recites Luke Records' consideration – its promises to compensate Thompkins for his assignment of fifty percent of the copyrights. Accordingly, we find that the 1992 Addendum is valid and binding on Thompkins, and Luke Records held half-ownership in the composition copyrights in the Poison Clan Songs. Thus, when we refer to "copyrights" in this subsection, we include both the sound recording and musical composition copyrights. Furthermore, because the 1992 Addendum modified the terms of the 1989 Agreement, for ease of reference we hereinafter include the former when we refer to the latter.

the effect of the Joint Plan confirmation, arguing instead that Luke Records' ownership of the copyrights was unaffected by its rejection of any contracts. Thus, Lil' Joe contends, those copyrights were transferred to Lil' Joe among other Luke Records assets disposed of by the terms of the Joint Plan.

The terms of the 1989 Agreement clearly transferred ownership of the disputed copyrights to Luke Records in the course of its business relationship with Thompkins, well before the bankruptcy. The parties now dispute the effect on copyright ownership caused by Luke Records' rejection of the 1989 Agreement in the bankruptcy as an executory contract pursuant to 11 U.S.C. § 365.[13] Because post-

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13 Under § 365(a), "the trustee, subject to the court's approval, may assume or reject any executory contract . . . of the debtor." This provision has spawned much litigation over the proper definition of an "executory contract," and courts have struggled to formulate a coherent approach to the issue. The parties in this case have likewise grappled with the definition of the contracts at issue between Thompkins and Luke Records. On appeal, the parties agree that the contracts were "executory" for the purposes of § 365 and that Luke Records rejected them. But this rare point of agreement between the parties is unique to the appeal in this case; in the district court, Thompkins maintained exactly the opposite position, asserting that the contracts were improperly treated as executory by the bankruptcy court.

Fortunately, we need not descend into the morass and attempt to define "executory" in this case. The parties do not contest that issue on appeal, and even if they were so inclined, we might otherwise be precluded from reconsidering the "executoriness" of the contracts. That issue was already decided by various bankruptcy court orders deeming the relevant contracts to be executory and confirming their rejection. In addition to the Confirmation Order generally deeming any unassumed contracts to be rejected, the order setting the bar date for rejection claims in the Luke Records bankruptcy specifically designated the "exclusive

bankruptcy ownership of the copyrights determines Thompkins's ability to assert copyright claims on the Poison Clan Songs in this suit, we must decide whether Luke Records' rejection of the 1989 Agreement had any effect on Luke Records' - or, more precisely, its bankruptcy estate's - continued ownership of those copyrights in the bankruptcy.

We hold that the rejection of the 1989 Agreement did not cause ownership of the Poison Clan Song copyrights to revert to Thompkins; thus, the copyrights properly passed into Luke Records' bankruptcy estate and from there were legally assigned to Lil' Joe. In essence, Thompkins asks this

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recording contracts" with Poison Clan as rejected executory contracts.

Although we do not find it necessary to reexamine whether the 1989 Agreement was properly treated as "executory," we note that the bankruptcy court's approval of the rejection of the 1989 Agreement would be consistent with the "functional approach" to "executoriness" that we have tacitly approved in our precedent. That is, "[e]ven though there may be material obligations outstanding on the part of only one of the parties to the contract, it may nevertheless be deemed executory . . . if its assumption[] [or] rejection would ultimately benefit the estate and its creditors." Sipes v. Gen. Dev. Corp. (In re Gen. Dev. Corp.), 177 B.R. 1000, 1012 (S.D. Fla. 1995) (quoting Order on Evidentiary Rehearing Pursuant to Remand at 11–16, Sipes v. Gen. Dev. Corp. (In re Gen. Dev. Corp.), No. 90-12231, (Bankr. S.D. Fla. Sept. 16, 1994) (emphasis omitted)), aff'd sub nom. Sipes v. Atl. Gulf Cmtys. Corp. (In re Gen. Dev. Corp.), 84 F.3d 1364, 1365, 1374 (11th Cir. 1996). The bankruptcy court presumably determined that rejection of the 1989 Agreement would benefit the Luke Records estate by maximizing the value of the copyrights. The enhanced value of the copyrights in turn increased the value of the estate and the amount available to be paid to all of Luke Records' creditors – including Thompkins, had he properly filed a claim in the bankruptcy.

court to deem an executory contract rejection under § 365 to be the functional equivalent of a rescission, rendering void the contract and requiring that the parties be put back in the positions they occupied before the contract was formed.[14] This is not the purpose of § 365, nor does Thompkins cite any authority to show otherwise.

In support of his argument, Thompkins relies on the proposition that a debtor cannot accept only the benefits of an executory contract while eschewing the burdens. See, e.g., In re Beverage Canners Int'l Corp., 255 B.R. 89, 95 (Bankr. S.D. Fla. 2000); 3 Collier on Bankruptcy § 365.03[1](15 th ed. rev. 2005). He also correctly observes that § 365 of the bankruptcy code ordinarily deems rejection of an executory contract to be "a breach of such contract . . . immediately before the date of the filing of the [bankruptcy] petition." 11 U.S.C. § 365(g); see also Cohen v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.), 138 B.R. 687, 711 (Bankr. S.D.N.Y. 1992). Thompkins apparently concludes that because Luke Records' rejection of the 1989 Agreement constituted a pre-petition breach of that contract, that event somehow reverses any transfer of asset ownership previously carried out by the rejected contract. In other words, Luke Records' rejection of the "burdens" of the 1989 Agreement prevents Luke Records from keeping the "benefits," which, in Thompkins's view, are the copyrights Luke Records received.

It is true that a debtor must either assume an executory contract in its entirety or completely reject it, see Byrd v. Gardinier, Inc. (In re Gardinier, Inc.), 831 F.2d 974,

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14 Thompkins also alleges a separate cause of action in his amended complaint for "Rescission and Restitution" under Florida law. We address that claim in part III.C.2., infra.

975 (11 th Cir. 1987), but Thompkins misunderstands the implications of rejection under § 365. Thompkins's argument basically calls for an interpretation of rejection as an outright dissolution of the contract. But rejection "does not embody the contract-vaporizing properties so commonly ascribed to it. . . . Rejection merely frees the estate from the obligation to perform; it does not make the contract disappear." In re Drexel Burnham Lambert Group, Inc., 138 B.R. at 703. More specifically, "[r]ejection has absolutely no effect upon the contract's continued existence; the contract is not cancelled, repudiated, rescinded, or in any other fashion terminated." Id. at 703 (quotations omitted); see also Eastover Bank for Savings v. Sowashee Venture (In re Austin Dev. Co.), 19 F.3d 1077, 1082 (5 th Cir. 1994) (holding that rejection under § 365(g) "does not mean that the executory contract . . . has been terminated, but only that a breach has been deemed to occur"); O'Neill v. Cont'l Airlines, Inc. (In re Cont'l Airlines), 981 F.2d 1450, 1459 (5 th Cir. 1993) ("To assert that a contract effectively does not exist as of the date of rejection is inconsistent with deeming the same contract breached."); cf. Enter. Energy Corp. v. United States (In re Columbia Gas Sys., Inc.), 50 F.3d 233, 239 n.8 (3d Cir. 1995) ("Rejection, which is appropriate when a contract is a liability to the bankrupt, is equivolent to a nonbankruptcy breach.").

The Drexel Burnham Lambert Group case cited by Thompkins himself, presents a useful illustration of what a § 365 rejection does and does not affect. The corporate debtor, in an attempt to avoid its prospective obligations to compensate its former general counsel under the terms of an employment agreement, sought to reject the agreement as executory under § 365. In re Drexel Burnham Lambert Group, Inc., 138 B.R. at 694-95. Among the compensation provided for in the agreement were various monetary

payments, plus three stock portfolios purchased by the former general counsel from the debtor upon execution of the agreement and held in escrow for future disbursement. Id. at 692. The debtor claimed that by rejecting the employment contract - the means by which the stock portfolios were purchased and escrowed by the general counsel - the debtor "pull[ed] the plug" on the general counsel's rights to the escrowed portfolios. Id. at 695.

The bankruptcy court granted the debtor's motion to reject the contract, resulting in a prepetition breach under the terms of § 365(g) and converting the monetary balance owed to the general counsel into "a general unsecured claim that can be paid in 'tiny Bankruptcy Dollars.'" Id. at 711 (citation omitted). As to the stock portfolios, however, the court "repudiate[d] Debtor's contention that rejection vaporizes or otherwise avoids [the general counsel's] interest in the escrowed funds." Id. The terms of the agreement gave the general counsel "both legal title and the equitable interest" in the escrowed stock, and the only right the debtor company retained in the stock upon execution of the agreement was a contingent interest subject to a condition subsequent, which ultimately never materialized. Id. at 710. When the condition subsequent became moot, the general counsel "became entitled to immediate possession" of the stocks, and that possession was unaffected by the rejection of the contract. Id.

Like the debtor in Drexel Burnham Lambert Group, Thompkins argues that Luke Records "pulled the plug" on its own claim of ownership over the copyrights when it rejected the contract; thus, he contends, the copyrights could not have been assigned to Lil' Joe out of Luke Records' estate. But like the bankruptcy court in Drexel Burnham Lambert Group, other courts have observed that rejection differently affects

the unperformed portions of an executory agreement and those provisions of the agreement that, by their nature, are fully executed. See Rudaw/Empirical Software Prods. Ltd. V. Elgar Elecs. Corp. (In re Rudaw/Empirical Software Prods' Ltd.), 83 B.R. 241, 246 (Bankr. S.D.N.Y. 1988); In re Executive Tech. Data Sys., 79 B.R. 276, 282 (Bankr. E.D. Mich. 1987) ("Section 365 addresses only future performance obligations of the parties. It does not have any impact upon the executed portions of a contract."); cf. Leasing Serv. Corp. v. First Tenn. Bank Nat'l Ass'n, 826 F.2d 434, 436-37 (6 th Cir. 1987) (holding that a security interest, which was created by covenant in an executory agreement, was fully vested and thus non-executory, leaving it unaffected by the bankruptcy trustee's rejection of the executory agreement) (citing Jenson v. Cont'l Fin. Corp., 591 F.2d 477, 482 (8 th Cir. 1979)). The rejection of a pre-petition executory contract pursuant to which the debtor acquired property does not obligate the debtor to return the property. In re Executive Tech. Data Sys., 79 B.R. at 282; see also In re Rudaw/Empirical Software Prods. Lit., 83 B.R. at 245-46 ("[T]he debtor cannot undo an executed sale of property where title has passed. Such property does not revert . . . as a result of the debtor's rejection of the executory contract."); In re DMR Fin. Servs., Inc., 274 B.R. 465, 472 (Bankr. E.D. Mich. 2002) (dictum); cf. Fain v. Irving Trust Co. (In re Waterson, Berlin & Snyder Co.), 48 F.2d 704, 710 (2d Cir. 1931) (holding that where copyright assignments from composers to debtor "were absolute," "title is in the bankrupt estate. . . . The composers cannot object if the trustee sells the copyrights").

There is no debate that Thompkins's transfer of his copyrights to Luke Records under the 1989 Agreement was an executed sale of property. The terms of the Agreement leave Thompkins not even so much as a contingent interest in

the copyrights. Nor did Thompkins negotiate any specific requirements for the sale or promotion of his records; Luke Records needed only to "commercially release" each record, which it undisputedly did, and all matters of business judgment in such efforts were reserved to Luke Records and binding on Thompkins. To the extent the 1989 Agreement was "executory," in the sense of not being fully executed, it was only insofar as Luke Records was required to pay Thompkins royalties based on any future sales of his records. The transfer of the copyrights was fully executed, however, and Luke Records held full legal and equitable title under the terms of the Agreement.

Thus, when the bankruptcy court approved the rejection of the Agreement, it freed Luke Records from the obligation, or "burden," to pay royalties under the contractual terms and gave Thompkins a pre-petition claim for damages resulting from the breach. See In re Gardinier, Inc., 831 F.2d at 976 n.2; In re Austin Dev. Co., 19 F.3d at 1082; In re Drexel Burnham Lambert Group, Inc., 138 B.R. at 711. It also would have released Thompkins from any outstanding obligation to perform under the Agreement - i.e., to convey any as-yet unrealized "benefit" to Luke Records. But the bankruptcy court's Confirmation Order did not effectively rescind the 1989 Agreement and reverse the executed transfer of the Poison Clan Song copyrights to Luke Records. The rejection had no effect on Luke Records' ownership of the copyrights, and they passed from the estate to Lil' Joe under the terms of the Joint Plan and Confirmation Order (and the later documents executing the agreed upon and confirmed terms of the reorganization). Accordingly, Thompkins cannot support a claim of copyright infringement against Lil' Joe as to the Poison Clan Songs, and we affirm the grant of summary judgment on that claim in favor of Lil' Joe.

2.

Thompkins's complaint also alleges copyright infringement as to songs that he created and performed in collaboration with Luther Campbell for use on Campbell' records. In his amended complaint, Thompkins alleges that he granted Luke Records only "a non-exclusive license to exploit his performances" on these Campbell Songs in exchange for royalties, and that the four Sideman Agreements he signed regarding these songs did not "transfer any of Plaintiff's ownerships [sic] interests in the copyright in either the sound recordings or the compositions." There is scant evidence in the record pertaining to the Campbell Songs, and none of it appears to address ownership of copyrights, whether in the sound recordings or musical compositions. Presumably, under 17 U.S.C. § 201(a), Thompkins was at least a co-owner of the copyrights in joint works to which he contributed.

But whether or not Thompkins might have been able to make out a claim of infringement on the Campbell Songs, he does not specifically address that claim in his arguments on appeal. Accordingly, we determine that the claim is waived, and we do not consider it here. See Allstate Ins. Co. v. Swann, 27 F.3d 1539, 1542 (11 th Cir. 1994) ("Issues that clearly are not designated in the initial brief ordinarily are considered abandoned."). Although Thompkins filed a general notice of appeal from the entry of final judgment on all his claims, and "[a]lthough we have a practice of reading briefs liberally to ascertain the issues raised on appeal," U.S. v. Milam, 855 F.2d 739, 743 (11 th Cir. 1988), under no fair reading of Thompkins's briefs could we conclude that he asserted on appeal an argument pertaining to his claim of infringement of the Campbell Songs. See id.

Thompkins has failed to mention these songs at all on appeal, and his initial brief's statement of the issues relevant to the copyright claims focus entirely on the effect of rejection under § 365. Based on the scant record regarding Thompkins's claim of infringement on the Campbell Songs, it appears his theory is that Luke Records never obtained any ownership interest in the Campbell Song copyrights in the first instance. If that were true (and we express no opinion either way on the issue), the Luke Records bankruptcy proceedings would be irrelevant to that claim. Thompkins would ostensibly have retained whatever ownership interest he originally had in the Campbell Song copyrights, and his infringement claim against Lil' Joe would be uncomplicated by the intervening transfer of assets through the bankruptcy and its attendant affects on the parties' rights to the assets. Because Thompkins chose to argue on appeal only his interpretation of the effects of rejection under § 365 - relevant only to those assets that might have transferred through the bankruptcy, i.e., the copyrights in the Poison Clan Songs - and because he nowhere mentions his claim regarding the Campbell Songs, we must deem that claim to be waived. See id. (Deeming an untimely-raised alternate argument to be waived on appeal where, "[i]ntentionally or not, the appellants . . . took an 'all or nothing' approach" by not appealing the district court's decision on the alternate ground).

B.

In addition to his copyright claims, Thompkins alleges that Lil' Joe has violated provisions of the Lanham Trademark Act of 1946, ch. 540, 60 Stat. 427 (codified as amended in scattered sections of 15 U.S.C.). On appeal, Thompkins argues that Lil' Joe runs afoul of two separate

provisions of the Act: 15 U.S.C. § 1114,[15] dealing with trademark infringement, and 15 U.S.C. § 1125, [16]dealing with

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15 15 U.S.C. § 1114(1) provides in relevant part:

> Any person who shall, without the consent of the registrant -
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> (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or
>
> (b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive,
>
> shall be liable in a civil actin by the registrant for the remedies hereinafter provided.

16 15 U.S.C. § 1125(a)(1) provides in relevant part:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which -
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person

false designation of origin. First, Thompkins's § 1114 claim was not properly raised in the district court, and thus we do not consider it here. Even a generous reading of Thompkins's amended complaint in light of liberal pleading rules reveals that the complaint nowhere states a claim under § 1114. The complaint never so much as mentions the word "trademark," let alone alleges that Thompkins owns one and that Lil' Joe used it in an infringing manner. Thompkins apparently first attended to assert his would-be § 1114 claim in his response to Lil' Joe's motion for summary judgment. This is procedurally improper; at the summary judgment stage, Thompkins should have sought to amend his complaint in accordance with Federal Rule of Civil Procedure 15(a) if he wished to add a claim. See Gilmour v. Gates, McDonald & Co., 382 F.3d 1312, 1315 (11 th Cir. 2004).[17]

We dispose just as easily of Thompkins's § 1125

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who believe that he or she is or is likely to be damaged by such act.

17 Thompkins argues that his § 1114 claim was preserved through the Joint Pretrial Stipulation filed by the parties in the district court. He cites this court's decision in G.I.C. Corp. v. United States, 121 F.3d 1447, 1450 (11th Cir. 1997), for the proposition that parties are bound by their assertions in pretrial stipulations under Fed. R. Civ. P. 16. He argues that, because Lil' Joe listed "the scope of the 'J.T. Money' trademark" on the Stipulation as among the remaining issues of fact to be decided by the district court, it cannot contest the pleading of his § 1114 claim. Essentially, Thompkins argues that a defendant can stipulate away in pretrial proceedings its objection to a claim that was never pled in any form in the complaint. Even if that were true – G.I.C. Corp. does not stand for that proposition, and we do not decide it here – we find that Thompkins overstates the contents of the pretrial stipulation. Lil' Joe does not stipulate to the existence of a § 1114 claim; in fact, neither party lists § 1114 or "trademark infringement" or any like phrasing as among the legal issues it considers still in dispute. Under these circumstances, we can hardly find that the pretrial stipulation indicated Lil' Joe's accession to the existence of a § 1114 claim that was never pled in the complaint.

claim for false designation of origin. Thompkins essentially claims that by selling copies of records that he wrote and performed, Lil' Joe is falsely designating itself the "origin" of those "goods," in contravention of that statute. Thompkins does not allege that Lil' Joe is selling his records under someone else's name - i.e., passing off his works as those of another artist - but simply that Lil' Joe is selling copies of Thompkins's works with Lil' Joe indicated as the creator of the actual physical records. The Supreme Court has explicitly held that such conduct does not give rise to a claim under § 1125. Dastar Corp. V. Twentieth Century Fox Film Corp., 539 U.S. 23, 37-38, 123 S. Ct. 2041, 2050, 156 L. Ed. 2d 18 (2003) (interpreting "origin of goods" under the statute to refer to "the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods"). Thompkins concedes on appeal that this is so; accordingly, his §1125 claim fails.

C.

As an alternative to his claim of copyright ownership, Thompkins alleges four claims based on contract theories under Florida common law. We first address Thompkins's breach of contract claim, and then we address his remaining contract claims together.

1.

Thompkins bases his breach of contract claim on the theory that Lil' Joe became liable for Luke Records' obligations when it purchased Luke Records' assets in the bankruptcy. Although Thompkins's entitlement to royalties arose entirely from his contracts with Luke Records, Thompkins alleges that Luke records is the "predecessor in

interest" to Lil' Joe, and that Lil' Joe has reproduced and used Thompkins's sound recordings and musical compositions "under the contractual agreements between Plaintiff and Luke [Records] assumed by [Lil' Joe]." By failing to pay him royalties in accordance with his agreements with Luke Records. Thompkins argues, Lil' Joe has breached those contracts.

Notably, Thompkins does not allege that Lil' Joe breached any contract to which it was itself an original party, nor does he claim that Lil' Joe came to be liable for Luke Records' contractual obligations by execution of a novation or any other sort of contractual device. Instead, he claims that the bankruptcy proceedings, by operation of law, resulted in Lil' Joe being subject to a duty to pay royalties.[18] T

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18 In addition to the reorganization provisions summarized in part I.B., supra, the Confirmation Order also specified certain binding modifications to the terms of the Joint Plan and Letter of Intent. Among these modifications, the Order states that, "[i]n addition to the other assets to be transferred to [Lil' Joe] under the terms of the Plan and the Letter of Intent, Luke Records is hereby directed to transfer and assign to [Lil' Joe] . . . all of its right, title and interest in and to each contract rejected pursuant to Section 365 of the Bankruptcy Code, subject to the Liquidating Trustees' right to assert defenses, recoupment or setoff." This language also appears in the Bill of Sale from Luke Records to Lil' Joe for the master recordings themselves, which were purportedly transferred "[t]ogether with . . . all right, title and interest in and to each contract rejected pursuant to section 365 . . . free and clear of any and all liens, claims, encumbrances, charges, setoffs, or any recoupments of any kind, and shall be transferred free and clear of any interest in such property of an entity other than [Luke Records]."

In our review of the record, this language alone among all the bankruptcy court filings suggests any possible intent by the bankruptcy court to transfer any rights or obligations under the various Thompkins-Luke Records contracts to Lil' Joe (as opposed to ownership of the master recording and copyright assets themselves). Thompkins, however, does not invoke this language in support of his contract claims against

hompkins argues that this result is necessary to protect the authorial interest recognized by copyright law. According to his essentially equitable theory, it is unfair for his royalty rights to be served from the copyrights through the bankruptcy.

We are not persuaded. In support of his argument, Thompkins relies primarily on a decision of the Ninth Circuit Court of Appeals in Yount v. Acuff Rose-Opryland, 103 F.3d 830 (9 th Cir. 1996), which in turn cites Fain v. Irving Trust Co. (In re Waterson, Berlin & Snyder Co.), 48 F.2d 704 (2d Cir. 1931). The Yount case lends Thompkins's argument no support, as the purchaser of the copyrights out of bankruptcy in that case apparently did not contest that it had assumed the royalty obligation created by the original copyright assignment/royalty agreement entered into by the debtor. 103 F.3d at 832-33. Yount concerned only a dispute over which of two parties was the proper recipient of the royalties. Id. The In re Waterson, Berlin & Snyder Co. decision, on its face, appears more pertinent. In that case, the Second Circuit held that, although a trustee may sell copyrights out of a bankruptcy estate, "they should be sold subject to the right of the composers to have them worked in their behalf and to be

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Lil' Joe - in fact, neither party addresses it at all. This is just as well, for we find the language to be inconclusive. If, as is clearly the case, the bankruptcy court deemed the Thompkins-Luke Records contracts to be executory and ordered their rejection, then, as a result of that unappealed order, Luke Records was freed of its obligation to perform. Thus, Luke Records no longer owed any contractual duty that could be transferred to Lil' Joe as a "right, title [or] interest" in the contracts; all that remained was a rejection damages claim that Thompkins could have asserted via a proof of claim in the bankruptcy against Luke Records. At most, then, the above-quoted modification language would seem to have created a null set. Accordingly, we find it does not affect this appeal.

paid royalties according to the terms of the contracts." In re Waterson, Berlin & Snyder Co., 48 F.2d at 710. In deciding to impose an equitable servitude on the copyrights, the court was choosing between what it saw as two possible outcomes. Id. As the court framed the problem, either the copyright transfer might be rescinded and the copyrights reconveyed to the authors, or the copyrights could be sold subject to the royalty obligations entered into by the debtor. Id.

Neither of the options considered by the court in In re Waterson, Berlin & Snyder Co. is possible within the mechanism provided by § 365 under the current incarnation of the bankruptcy code,[19] and the parties do not dispute that it is the operation of § 365 that determines their respective rights. As we have discussed, supra, rescission is not a possible function of § 365.[20] Nor does the equitable imposition of a royalty obligation on the post-bankruptcy purchaser of copyright assets serve the purposes of the bankruptcy code. The court in In re Waterson, Berlin & Snyder Co. Was concerned that, unless the author's royalty rights followed the copyrights through the bankruptcy to the

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19 Of course, § 365 did not exist in its current form until 1978, decades after the Second Circuit decided In re Waterson, Berlin & snyder Co. See 11 U.S.C. § 365 (originally enacted as Bankruptcy Act of 1978, ch. 3, § 365, 92 Stat. 2549). That court, however, did not refer to any then-existing principles of bankruptcy law governing rejection of contracts, either, nor does the opinion suggest that the trustee in that case attempted to reject the copyright transfer agreement. For these reasons, we find the decision not to be persuasive in our consideration of the instant case.

20 To the extent that rescission of a copyright transfer agreement is possible at all, it would be under state law, not § 365. See Yount, 103 F.3d at 834 ("[R]ecission itself is a creature of state law. Nothing in [In re Waterson, Berlin & Snyder Co.] suggests the contrary." (citation omitted)). See discussion at part III.C.2., infra.

purchaser of the assets, the author may be "deprive[d] . . . of the only means of fixing the royalties which [he has] been promised." 48 F.2d at 710. But the bankruptcy code specifically addresses that problem by providing that rejection of an executory contract under § 365(g) constitutes a re-petition breach, and the non-debtor party to the rejected contract becomes a general unsecured creditor who may seek contract damages against the debtor as a pre-petition claim in the bankruptcy. See 11 U.S.C. § 502(g); Byrd v. Gardinier, Inc. (In re Gardinier, Inc.), 831 F.2d 974, 976 n.2 (11 th Cir. 1987); Eastover Bank for Savings v. Sowashee Venture (In re Austin Dev. Co.), 19 F.3d 1077, 1082 (5 th Cir. 1994); 3 Collier on Bankruptcy § 365.09 (15 th ed. Rev. 2005).

Thus, the author-assignor is not left completely without recourse in the event that his original copyrights, transferred in consideration of future royalties, are alter sold to a third party out of the debtor-assignee's estate, free and clear of royalty obligations due to the rejection of the original copyright transfer/royalty agreement. In that event, the bankruptcy code explicitly provides a means by which the author can file a damages claim against the debtor for what is deemed a pre-petition breach of contract.

This was precisely the course available to Thompkins, and of which he undisputedly did not avail himself. Luke Records' obligation to pay royalties - wholly a creature of its contracts with Thompkins - was rejected in accordance with § 365 along with all Luke Records' other contractual obligations to Thompkins. The bankruptcy court confirmed that rejection and ordered the non-debtor parties to rejected contracts to file proofs of claim for rejection damages within thirty days of the date of the Confirmation Order "or forever be barred from asserting such claims." Thompkins had notice of these developments, but did not file a claim for

damages.[21] The bankruptcy court's disposition of the Joint Plan and the estate's assets was consistent with the code's scheme for rejection damages. Thompkins simply slept on his rights, and any damages to which he might have been entitled were waived accordingly.

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21 Thompkins did file a proof of claim earlier in the Luke Records bankruptcy, prior to the proposal of the Joint Plan. That proof of claim, however, only sought pre-petition royalties on records already sold, not damages for the breach of Luke Records' prospective obligation to pay Thompkins royalties on future sales of his works. The proof of claim was how Thompkins became known to the bankruptcy court as a creditor, and it resulted in his being on notice of all the later proceedings involving the Joint Plan and its confirmation. Thompkins did not recover anything on that proof of claim for past royalties; the creditors' committee objected to it, and he never did anything else to protect his rights.

Although it is not directly pertinent to this appeal, we also note that while any damages claim Thompkins might have made for future royalties would necessarily have been somewhat speculative, the bankruptcy code anticipates this issue and explicitly allows for the estimation of "any contingent or unliquidated claim, the fixing or liquidation of which . . . would unduly delay the administration of the case." See 11 U.S.C. § 502(c)(1); Certified Class v. Charter Co. (In re Charter Co.), 876 F.2d 866, 872–73 (11th Cir. 1989) (noting that estimation of contingent and unliquidated claims is "mandatory" under the code, and that bankruptcy courts are thus "well used to the estimation procedures . . . even in complex cases"). The estimation provision thus makes it possible for a creditor in Thompkins's position to recover some damages through the bankruptcy where otherwise he might have little or none. In a standard contract suit for future royalties, such as his claim here, Thompkins's damages would be speculative and would likely result in only nominal damages.

Nor does the prospective nature of the rejection damages somehow remove them from the category of pre-petition claims to be disposed of in bankruptcy; although the damages are valued on an estimation of future royalties, the breach for which the damages are awarded is deemed to be pre-petition by operation of § 365(g).

Of course, while it is useful to note what Thompkins should have done to protect his rights as against Luke Records in the bankruptcy, his potential recovery there is not the issue that controls Thompkins's contract claims against Lil' Joe here. Instead, we need only observe that, upon its rejection of the contract, Luke Records was no longer obliged to pay royalties. In the place of royalties, Thompkins was entitled to rejection damages from Luke Records' estate in the bankruptcy - none of which has anything to do with Lil' Joe. Furthermore, the bankruptcy court ordered that Lil' Joe was a good faith, arms'-length, third party purchaser, and that the assets it was purchasing were to be transferred "free and clear of any interest in such property of an entity other than the Debtors." Thus, Thompkins cannot show that any of Luke Records' obligations under its contracts with Thompkins passed through the bankruptcy to bind Lil' Joe. Without being able to prove the existence of a valid contract with Lil' Joe, he cannot maintain a claim for breach of contract under Florida law. See Rollins, Inc. v. Butland, __ So. 2d__, No. 2D05-368, 2006 WL 3686484, at *12 (Fla. 2d Dist. Ct. App. Dec. 15, 2006) (reciting the elements of a breach of contract claim).

2.

Thompkins's remaining claims based on contract theories are more easily resolved. In light of our above holdings, they are without merit. First, Thompkins alleges a quasi-contractual theory of unjust enrichment, claiming that Lil' Joe has unjustly profited from its "misappropriation" of his works and its "receipt of profits and monies owed and due Plaintiff from such works." Among other elements of an unjust enrichment claim under Florida law, a plaintiff must show circumstances such that it would be inequitable for the defendant to retain the benefit conferred by the plaintiff

without paying for it. Nova Info. Sys., Inc. v. Greenwich Ins. Co., 365 F.3d 996, 1006-07 (11 th Cir. 2004). As we have held, supra, however, Lil' Joe became lawful owner of the copyrights through the bankruptcy, and it has no royalties obligations to Thompkins. Thus, any profits Lil' Joe realizes from its exploitation of the copyrights that it lawfully purchased through the bankruptcy cannot be characterized as unjust, and Thompkins cannot maintain this claim.

Next, Thompkins makes a claim of promissory estoppel, the first element of which is a representation by the defendant as to a material fact that is contrary to a later-asserted position. Romo v. Amedex Ins. Co., 930 So. 2d 643, 650 (Fla. 3d Dist. Ct. App. 2006). Thompkins alleges that "Defendants have made promises to honor and pay for their exploitation of Plaintiff's sound recordings and copyrighted works." We find no evidence in the record of any such representations by Lil' Joe to support this assertion. It is unclear what Thompkins even intended by this claim, because the complaint contains no allegation identifying exactly what constituted the purported promise by Lil' Joe - or, for that matter, the later-asserted position contrary to that promise. Nor does our review of the record shed any significant light on what the allegedly actionable promise might be, given that all of Thompkins's business dealings relevant to this case were with Luke Records, not Lil' Joe.[22]

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22 We acknowledge that defendant Weinberger, prior to starting his own recording business as Lil' Joe Records, served as in-house counsel to Luke Records, and that Weinberger was ostensibly involved in at least some of Luke Records' dealings with Thompkins. But even if Thompkins meant to allege that Weinberger individually made the promise that is the subject of his estoppel claim, this argument is nonsensical. We fail to see how any representations Weinberger may have made in the course of those dealings could constitute a promise to "honor and pay for" exploitation of Thompkins's works by Lil' Joe –

The only glimmer of a possible theory behind Thompkins's promissory estoppel claim comes from his reply to Lil' Joe's summary judgment motion in the district court. There, in support of the claim, Thompkins asserted that "Weinberger promised and agreed in writing to the bankruptcy court that he would pay the artists, and then takes a contrary position." Here again, Thompkins's theory is based on his misunderstanding of the bankruptcy proceedings. Lil' Joe made no such promise in the bankruptcy; on the contrary, Lil' Joe has consistently asserted that it purchased the copyrights free and clear of any obligation to pay royalties. Accordingly, Thompkins's promissory estoppel claim also fails.

Finally, Thompkins makes a claim for rescission and restitution. While a party to recording contracts can properly seek rescission of those agreements under state law, see Yount, 103 F.3d at 834, Thompkins's theory in support of his claim is flawed. He alleges that "Plaintiff and Defendants entered into various agreements regarding the exploitation of Plaintiff's Works," and prays that "each and every contract or license or agreement of any kind between Plaintiff and Defendant be deemed rescinded." Yet, as we have noted, supra, none of the Luke Records agreements bind Lil' Joe, and Thompkins points to nothing in the record indicating that Lil' Joe ever entered into any other contract that would be

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Lil' Joe Records did not even exist until after Weinberger left Luke Records. Moreover, Luke Records was still solvent throughout Weinberger's employment. Weinberger could not have known that a company he had not yet founded would ultimately purchase and exploit some of Thompkins's works as a result of a Luke Records bankruptcy that had yet to happen.

pertinent.[23] Thus, Thompkins's claim fails the first requirement of a suit for rescission under Florida law - that the parties to the lawsuit lie in contractual privity. See Bland v. Freightliner LLC, 206 F. Supp. 2d 1202, 1206-07 (M.D. Fla. 2002). If Thompkins wished to seek rescission of his recording agreements, he should have done so in a claim against Luke Records, either before or as part of the bankruptcy proceedings. That ship has long since sailed, so Thompkins's claim of rescission here against Lil' Joe must fail as a matter of law.

D.

Finally, we consider Thompkins's claim of fraud under Florida law. The requirements for a claim of fraud or fraudulent inducement are: (1) a false statement regarding a material fact; (2) the statement maker's knowledge that the representation is false; (3) intent that the representation induces another's reliance; and (4) consequent injury to the party acting in reliance. See Wadlington v. Cont'l Med. Servs., Inc., 907 So. 2d 631, 632 (Fla. 4 th Dist. Ct. App. 2005); Biscayne Inv. Group, Ltd. v. Guarantee Mgmt. Servs., Inc., 903 So.2d 251, 255 (Fla. 3d Dist. Ct. App. 2005).

We have trouble understanding the purported basis for this claim, as it appears Thompkins is himself unsure of the theory behind it. In his response to Lil' Joe's summary

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23 In our review of the record, we find evidence of only one contract to which both Thompkins and Lil' Joe were parties – a "sideman" agreement for Thompkins's contributions to songs by an artist named Mark Ross. Ross was also a party to the agreement, which is dated September 13, 1995. The agreement is irrelevant to this case. Thompkins does not address it in any of his arguments, which makes sense given that the gravamen of his claims relates entirely to the Luke Records agreements.

judgment motion in the district court, Thompkins lumped his fraud claim together with his claim for promissory estoppel. There, he made a conclusory argument that Lil' Joe misrepresented in the bankruptcy court that it would continue to pay the non-debtor parties to rejected contracts in accordance with Luke Records' royalty obligations. As we observed in our discussion of the promissory estoppel claim in part III.C.2., supra, this assertion is baseless.

Moreover, this later theory conflicts with the original theory of fraud that Thompkins alleged in the amended complaint. In pleading his fraud count in the complaint, Thompkins alleges four misrepresentations by Lil' Joe. Only one of these four alleged statements presents even a plausible basis for supporting the claim: [24] Thompkins alleges that, "[i]n order to induce Plaintiff to enter into the Luke Agreements, Luke [Records] and Weinberger represented to Plaintiff that Plaintiff would receive royalties and accountings from Luke [Records]."

This theory fails all the same, however. Thompkins accuses both Luke Records and Weinberger individually. If Luke Records - which is not a defendant here - made

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24 The remaining three alleged representations are that "Defendants own 100% of the copyrights in Plaintiff's Works," that "Defendant's [sic] have no duty or obligation to account or pay royalties to Plaintiff," and that "the Songwriter Agreements are genuine and authentic documents." To the extent that Lil' Joe made these representations to Thompkins, it is impossible for Thompkins to prove that he relied on them to his detriment. Indeed, the very existence of Thompkins's lawsuit here belies any allegation of reliance on these representations– not only did he not believe these statements to be true, but he filed this suit to challenge them. Nor does Thompkins otherwise substantiate his alleged reliance. Thompkins seems to misunderstand the nature of fraud; simply believing a statement to be false does not make it fraudulent.

misrepresentations to induce Thompkins to enter into contracts, Thompkins perhaps could have sued Luke Records, but he cannot recover from Lil' Joe for Luke Records' alleged torts. To the extent Thompkins alleges that defendant Weinberger individually misrepresented material facts (ostensibly during Weinberger's employment at Luke Records), the record simply contains no evidence to support it. While all of the contracts between Thompkins and Luke Records are premised on royalty payments, Thompkins points to no particular instances in which Weinberger individually represented to him that he would receive royalties and accountings.

Even if Thompkins had submitted such evidence, we doubt his claim has any merit. Under Florida law, a fraud claim cannot be premised on a promise to do something in the future except where the promise "is made without any intention of performing or made with the positive intention not to perform." Wadlington, 907 So. 2d at 632. Again, nothing in the record indicates that Weinberger or Luke Records intended at the time the contracts were made not to pay the royalties agreed upon. Additionally, we suspect this fraud claim is of the type barred by the economic loss rule in Florida, under which "[m]isrepresentations relating to the breaching party's performance of a contract do not give rise to any independent cause of action in tort, [where] such misrepresentations are interwoven and indistinct from the heart of the contractual agreement." Hotels of Key Largo, Inc. v. RHI Hotels, Inc., 694 So. 2d 74, 78 (Fla. 3d Dist. Ct. App. 1997). Here, Thompkins complains about nothing more than that Luke Records and Weinberger did not fulfill their promises under the contract - exactly the basis for a breach of contact claim. In any event, Thompkins's fraud claims are insufficient, and so they must fail.

IV.

Ultimately, this case boils down to a simple problem - Thompkins missed his chance through the bankruptcy to recover some of the royalty money he would have been owed by Luke Records. Having belatedly realized his error, he now asks this court to play the role of deus ex machina, swooping in to rescue his claims with interpretations of the bankruptcy code that ignore its premium on finality. This we cannot do. Thompkins may think unfair the procedure that Congress devised, but his legal arguments to overcome it are unavailing. We AFFIRM the district court's grant of summary judgment on all claims.

SO ORDERED.

Appendix B—Order Declining to Adopt The Magistrate's Report and Recommendation and Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment of the United States District Court for the Southern District of Florida, Miami Division, Dated and Decided December 7, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

JEFFREY J. THOMPKINS,	) Case No. 02-61161-) CIV-MORENO/) GARBER
Plaintiff,	)
vs.	)
LIL' JOE RECORDS, INC., LIL' JOE WEIN MUSIC, INC., JOSEPH WEINBERGER, and JOHN DOE INDIVIDUALS and CORPORATIONS 1-5,	)
Defendants.	)

OMNIBUS ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Before the Court is an action involving various

claims for relief arising from allegations of copyright and trademark infringement, as well as allegations of breach of contract, unjust enrichment, rescission, restitution, and fraud. At present, both parties petition the Court for partial summary judgment. For the reasons set forth below, the Court declines to adopt the report and recommendation, grants Defendants' motion for summary judgment and denies Plaintiff's motion for summary judgment.

I. BACKGROUND

Plaintiff Jeffrey Thompkins is a recording artist and songwriter. He is known professionally as J. T. Money and Poison Clan. Between 1989 and 1995, Plaintiff entered into a series of agreements with Luther Campbell and various companies under his control, including Luke Records, Pac Jam Music, Effect Records and Skyywalker Records, transferring copyright ownership. First, in 1989 Plaintiff entered into a Recording Agreement with Effect Records. An addendum to the 1989 Recording Agreement was executed later in 1989. Second, on March 30, 1999, Plaintiff entered an agreement with Luther Campbell, Pac Jam, and Skyywalker records. Third, on February 2, 1992, Plaintiff entered a series of Songwriter Contracts with Pac Jam. Fourth, on February 2, 1993, Plaintiff entered a Songwriter Contract with Pac Jam. Fifth, on February 21, 1995, Plaintiff entered an exclusive recording agreement with Luke Records.

Luke Records became the subject of an involuntary Chapter 7 bankruptcy petition, on March 28, 1995. Shortly thereafter, on June 12, 1995, Luther Campbell filed a voluntary Chapter 11 bankruptcy petition. The bankruptcy court converted the Luke Records bankruptcy into a voluntary Chapter 11 case on June 14, 1995 and jointly

administered the two estates.

Plaintiff filed a proof claim in the Luke Records bankruptcy on November 22, 1995 and began thereafter regularly receiving pleadings. On February 12, 1996, counsel for the official unsecured creditors committee filed objections to claim in the joint bankruptcy. Plaintiff filed nothing in response to the objections.

The bankruptcy court confirmed the joint plan of reorganization on March 26, 1996. The reorganization plan provided that the debtors' assets are to be sold to Defendants Joseph Weinberger ("Weinberger") and Lil' Joe Records ("Lil' Joe"). In addition, the order provided that all executory contracts are rejected. Moreover, the Court indicated in its bar date orders that parties to rejected contracts must file proofs of claim for nay rejection damages within thirty days of the date of the order. After such time, the Court indicated that claims for rejection damages would be barred.

Defendant Weinberger was employed by Luther Campbell and Luke Records from May 15, 1991 through December 27, 1994. The copyrights at issue in the instant action were assigned to Weinberger and Lil' Joe Records on April 8, 1996. The Bankruptcy Court found that Weinberger was a good faith purchaser.

Plaintiff originally filed its complaint on March 5, 2002 in the North District of Georgia. Over five months later, on August 20, 2002, the case was transferred to the Southern District of Florida and assigned to the Honorable Judge Wilkie D. Ferguson, Jr. On May 22, 2003, the case was then transferred to this Court due to Judge Ferguson's medical incapacitation. Following discovery, Defendants

and Plaintiff both moved for summary judgment. The cross motions for summary judgment were referred to a Magistrate on September 30, 2003. After extensive briefing and a hearing on the motions, the Magistrate issued a report and recommendation on March 16, 2004 in which he recommends the Court deny both motions for summary judgment. Defendants filed objections to the report and recommendation on April 2, 2004. Plaintiff responded to Defendants objections on April 19, 2004.

II. LEGAL STANDARD

Summary judgment is authorized when there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The party opposing the motion for summary judgment may not simply rest upon mere allegations or denials of the pleadings; the non-moving party must establish the essential elements of its case on which it will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. (1986). The nonmovant must present more than a scintilla of evidence in support of the nonmovant's position. A jury must be able reasonable to find for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

III. ANALYSIS

Defendants, in their motion for summary judgment, contend they are entitled to summary judgment because all of

Plaintiff's claims are barred by *res judicata*.[1] Plaintiff, for its part, filed a cross motion for partial summary judgment, demanding summary judgment as to its claim of ownership of the copyrights and to declare that the 1995 Agreements were executory contracts that were rejected and breached by defendants.

The Court is convinced that the judgment of the bankruptcy court in this matter should be accorded *res judicata* effect. The Seventh Circuit has held that "[w]hen a bankruptcy court approves the sale of an asset of the debtor, a person who has notice of the sale cannot later void it on the ground that he is the asset's real owner." *ITOFCA, Inc. V. Megatrans Logistics, Inc.*, 322 F.3d 928, 930 (7 th Cir. 2003).

The issue then becomes what assets were part of the debtor's estate at the time of the bankruptcy and reorganization, such that *res judicata* would operate to bar Plaintiff's claims. Defendants contend that all of Plaintiff's claims are barred by *res judicata* because the bankruptcy court determined that the disputed copyrights are part of the debtor's assets. Moreover, the Court approved the plan of reorganization that called for the sale of such assets to Weinberger and Lil' Joe. Defendants contend Plaintiff attempting to challenge the bankruptcy determinations collaterally in this Court over six years later.

Plaintiff advances a number of arguments in

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1 The Court notes that in addition to their *res judicata* argument, Defendants contend that Plaintiff's claims are untimely and that Plaintiff has failed to establish various elements of its claims for copyright infringement, fraud and promissory estoppel. The Court need not reach the merits of these arguments, despite the strength of some of them.

opposition to Defendants' *res judicata* contention. To Defendants' characterization that Plaintiff is attempting to challenge the bankruptcy through the instant action, Plaintiff counters that it merely seeks to challenge Defendants' interpretation of the bankruptcy. Plaintiff contends that the bankruptcy court never determined whether the works at issue here were part of the debtors' estates. Moreover, Plaintiff advances a number of arguments in furtherance of the position that the assets were not, in fact, part of the debtors' estates.

As to this critical issue, the Court finds that the assets here in dispute were indeed treated as belonging to the debtors' estates by the bankruptcy court. The bankruptcy court made specific reference to the Bills of Sale and Copyright Assignment in its order confirming the plan of reorganization. The Bills of Sale and Copyright Assignment indicate that the assets here in dispute were transferred to Defendants.

In addition, Plaintiff contends that the bankruptcy court's order of confirmation contemplated the payment of royalties. In support of this contention, Plaintiff argues that Defendants obtained the assets "subject to Lil' Joe paying all writers Royalties directly to the owners of the writing portion of the publishing rights." Plaintiff quotes from page 49 of the joint plan of reorganization. It appears however that Plaintiff has taken the aforementioned quote a bit out of context. The paragraph from which Plaintiff quotes provides in pertinent part:

> The Masters and all assets of Luke Records will be sold under this Plan. The Publishing Rights owned by Pac-Jam Publishing will be sold. Further, the Liquidating Trust in the Campbell case will execute an irrevocable

> exclusive license to Lil' Joe for all remaining compositions to enable Lil' Joe to exploit the Masters he is buying, *subject to Lil Joe paying all writers Royalties directly to the owners of the writing portion of the publishing rights.* [emphasis added]

Contrary to Plaintiffs' assertion, the obligation to pay royalties was attached to certain compositions in the Luther Campbell bankruptcy, not the Luke Records bankruptcy. In fact, the joint plan of reorganization makes no mention of any royalty obligations with respect to any assets from the Luke Records bankruptcy.

Moreover, Plaintiff's works were never part of the Luther Campbell estate because none of Plaintiff's recording or songwriter agreements were with Luther Campbell. Rather, the agreements transferred ownership to Luke Records and various other corporate entities. Because the assets in dispute were never part of the Luther Campbell estate, the obligation to pay royalties contemplated by the bankruptcy court is not applicable to Defendants.

IV. CONCLUSION

After careful review of the extensive pleadings, including a *de novo* review of the report and recommendation, the Court must decline to adopt the Magistrate's recommendations. In addition, the Court finds that *res judicata* operates to bar Plaintiff from asserting its claims and as a result, Defendants' motion for summary judgment is granted. Finally, in view of the Court's finding on *res judicata*, Plaintiff's motion for summary judgment is denied. Accordingly, it is

ADJUDGED that

1. The Court declines to adopt the Magistrate's Report and Recommendation **(D.E. No. 192)**, filed on **March 16, 2004**.

2. Defendants' Motion for Summary Judgment **(D.E. No. 76)**, filed on **September 26, 2003** is GRANTED.

3. Plaintiff's Motion for Summary Judgment **(D.E. No. 81)**, filed on **September 29, 2003** is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 7th day of December, 2004.

/s

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

CC LIST (OMITTED BY PETITIONER) of ATTORNEYS, ORIGINAL ORDER SIGNED BY JUDGE MORENO AND COPYING JUDGE BARRY L. GARBER

Appendix C—Report and Recommendation of the Magistrate Judge for the United States District Court for the Southern District of Florida, Miami Division, Dated and Decided March 16, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

JEFFREY J. THOMPKINS,	)	Case No. 02-61161-CIV-MORENO/GARBER
Plaintiff,	)	
vs.	)	
LIL' JOE RECORDS, INC., LIL' JOE WEIN MUSIC, INC., JOSEPH WEINBERGER, and JOHN DOE INDIVIDUALS and CORPORATIONS 1-5,	)	
Defendants.	)	

OMNIBUS REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Defendant's Motion for Final Summary Judgement (**D.E. 76**),filed September 26,2003 and Plaintiff's Motion for Partial Summary Judgment (**D.E.81**),filed September 29, 2003. Upon consideration of the motions, responses thereto, exhibits, submissions and oral argument, this court respectfully **REPORTS** and **RECOMMENDS** that

defendant's Motion for Final Summary Judgment(**D.E. 76**)be **DENIED** and that Plaintiff's Motion for Partial Summary Judgment(**D.E. 81**)be **DENIED** for reasons set forth herein.

PROCEDURAL HISTORY

This is *inter alia* a copyright infringement action over which this Court has statutory jurisdiction. Plaintiff filed his Amended Complaint (**D.E. 12**) on November 7, 2002, wherein he alleges violations of Copyright Act, 17 U.S.C. §§ 101 et seq. and the Lanham Act, 15 U.S.C. § 1125. In addition, Plaintiff seeks injunctive relief in connection therewith. Plaintiff also brings this action based upon under legal theories of breach of contract, unjust enrichment, promissory estoppel, rescission and restitution and fraud.

On April 7, 2003, Defendants filed their Second Amended Counterclaim (**D.E. 39**), whereby they allege breach of contract and conversion, and also seek declaratory relief and an accounting with respect to certain recording and songwriter agreements and pursuant to the Copyright Act. On November 4, 2003, this court heard an oral argument on the parties' summary judgment motions.

This cause has been fully briefed and is now ripe for adjudication on the pending Motions for Summary Judgment. The court has carefully considered the submissions, argument of counsel, applicable law, and otherwise being duly advised, finds that there exists genuine issues of material fact which preclude entry of summary judgment in this cause.

LEGAL STANDARD

A party seeking summary judgment must demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also* Maniccia v. Brown, 171 F.3d 1364, 1367 (11 th Cir.1999). The movant bears the initial responsibility of informing the Court of the basis for its motion and of identifying those materials which demonstrate the absence of a genuine issue of material fact. Celotex Corp. V. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986).

In response to a properly supported motion for summary judgment, "the adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts which show a genuine issue for trial." Fed. R. Civ. P. 56(e). If the non-moving party fails to "make a sufficient showing on an essential element of her case with respect to which she has the burden of proof," then the Court must enter summary judgment for the moving party. Celotex Corp., 477 U.S. at 323, 106 S. Ct. At 2552. The Court, however, must view the evidence and factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party. Maniccia, 171 F.3d at 1367.

"By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine issue of material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510 (1986) (emphasis added). The Court may not resolve factual issues, but may only determine whether factual issues exist. A material fact is one which "might affect the outcome of the suit under the governing law. . . ." Id. at

248, 106 S. Ct. At 2510. The Court's inquiry therefore is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* At 250, 106 S. Ct. at 2511.

BACKGROUND

Plaintiff is a songwriter and performing artist and Defendants are in the business of music publishing and distribution. Beginning in 1989, Plaintiff executed a number of contracts and agreements with Luther Campbell, Luke Records and or a number of Campbell-owned entities, including Pac Jam Music, effect Records and Skyywalker Records. Defendant alleges these contracts transferred copyrights to the musical composition of the disputed works to Campbell's companies. On March 28, 1995, Luke Records, Inc. Was the subject of an involuntary Chapter 7 bankruptcy petition. On June 12, 1995, Luther Campbell filed a Voluntary Chapter 11 bankruptcy petition, which was subsequently converted to a voluntary Chapter 11 case. A Debtor-in-Possession Motion to Assume and Assign Executory Contract was filed, but subsequently withdrawn. On February 26, 1996, a Joint Plan of Reorganization was filed in the bankruptcy proceeding and confirmed by the Bankruptcy Court on March 26, 1996, whereby the bankruptcy assets were purchased by Defendants. The parties vehemently disagree about what assets relating to Plaintiff were actually transferred in the bankruptcy proceeding.

Plaintiff's Motion

Plaintiff argues in his summary judgment motion that, at least as to the 1995 Recording Agreement with

Luke Records and the 1995 "sideman" agreement with Lil' Joe Records, he is entitled to summary judgment on his claim for breach of contract and failure to pay royalties under those contracts. He also alleges that the 1995 agreements were executory agreements, that those agreements were rejected by Luke in the bankruptcy, first by Luke's alleged failure to pay the second of two agreed advances, and second, by the return of the masters to Plaintiff's possession. Plaintiff argues that this rejection of the agreements meant that they were not part of any assets that were transferred to Defendants therefore had no legal right to the 1995 music and that it infringed on Plaintiff's rights by playing the music and failing to compensate Plaintiff for those activities.

In 1995, Plaintiff also executed a "sideman" agreement with Defendant, whereby Defendants allegedly contracted to pay Plaintiff a $10,000 advance upon signing and another $10,000 upon the final mixing of the songs he delivered on each of Mark Ross's (the principal artist) LPs. Plaintiff alleges that Ross failed to preform the contract and therefore this was also a rejected executory contract and Plaintiff had no residual obligation arising from that particular contract. Plaintiff does maintain, however, that he is entitled to payment under that contract for the songs that were completed.

Defendant's Motion

Defendants allege that they are entitled to summary judgment on all of Plaintiff's claims because, to the extent that all the contracts were part of the bankruptcy assets, claims related to them should have been made during the bankruptcy preceding, and are thus barred by *res judicata*. Defendants also assert defenses related to statutes of

limitation and laches. Finally, Defendants maintain that Weinberger owns the copyrights at issues and therefore there could be no infringement on his part.

DISCUSSION

This court finds that there are triable issues of fact concerning many essential elements of this case which preclude entry of summary judgment in this action. Before the court can get to the question of the legal effect of the bankruptcy court's order on the numerous agreements, there needs to be a fact finding as to what the agreements were in fact. For instance, there is dispute in the record as to whether Campbell and Plaintiff intended to enter into an executroy contract with the 1995 Recording Agreement. There is also an open question as to whether Campbell returned the "Strait Zooism" masters to Plaintiff, which Plaintiff alleges demonstrated a rejection of the executory agreement. Defendants conversely point to testimony of Plaintiff that he "took" the masters - that they were not returned. The court is asked to draw an inference that the return of the masters to Plaintiff was involuntary and, therefore, did not result in a legal rejection of the contract. The court may not draw any such inferences in its consideration of the parties' summary judgment motions. Watts v. Great Atl. & Pac. Tea Co., 842 F.2d 307, 309-310 (11 th Cir. 1988)(it is the function of the jury as the traditional finder of fact, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.).

In addition, Plaintiff points to record testimony from Mr. Weinberger that he believed that the bankruptcy trustee and Campbell actually rejected all the contracts. The statement raises the question of whether Mr. Weinberger

knew prior to the bankruptcy court's order that the contracts in dispute were rejected.

Similarly, Defendant would have the court conclude that Plaintiff's act of filing a proof of claim in the bankruptcy proceeding proved that he knew the contracts were being made part of the asset sale. This is another inference that the court cannot make in resolving the summary judgment motions

Finally, the parties have introduced into evidence unsigned contracts, contracts with allegedly forged signatures, contracts with the signatory's name spelled incorrectly, contracts signed with missing terms, and in support of his fraud allegations, Plaintiff points to a handwriting expert's testimony that defendant possibly signed one of the contracts aleeged to ahve been signed by Plaintiff. The court cannot, under these circumstances, look to the parties' intent to be or not be bound by the contract as Defendant suggests. (D.E. 105)(citing Skinner v. Haugseth, 426 So.2d 1127).

Plaintiff's claims and the Defendant's counterclaims depend on the validity, nature and status of the contracts in dispute, and finding that there are very few facts in that regard that are not in dispute, this court finds that the claims are not appropriate for disposition by final summary judgement.

CONCLUSION AND RECOMMENDATION

For the reasons set forth above, the undersigned respectfully

RECOMMENDS that the defendant's Motion for

Final Summary Judgment and the plaintiff's Motion for Partial Summary Judgment each be DENIED.

The parties have ten (10) days from the date of this Report and Recommendation within which to file written objections, if any, with United States District Judge Federico A. Moreno/Donald L. Graham. See 28 U.S.C. § 636 (1991). Failure to file timely objections may bar the parties from attacking on appeal the factual findings contained herein. LoConte v. Dugger, 847 F.2d 745, 750 (11 th Cir.), cert. Denied, 488 U.S. 958 (1988).

RESPECTFULLY SUBMITTED at the United States Courthouse, Miami, Florida this 16th day of March, 2004.

/s

BARRY L. GARBER
UNITED STATES MAGISTRATE JUDGE

CC LIST (OMITTED BY PETITIONER) of ATTORNEYS, ORIGINAL ORDER SIGNED BY JUDGE GARBER AND COPYING JUDGE FEDERICO MORENO

Appendix D—Order Denying Petition for Rehearing En Banc, Dated and Decided April 27, 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-10143-FF

JEFFREY J. THOMPKINS,	)
	)
	)
Plaintiff-Counter-Defendant-Appellant	)
	)
vs.	)
	)
LIL' JOE RECORDS, INC., LIL' JOE WEIN MUSIC, INC., JOSEPH WEINBERGER, and JOHN DOE INDIVIDUALS and CORPORATIONS 1-5,	)
	)
Defendants-Counter-Claimant-Appellees,	)
	)
NAVARRE CORPORATION,	)
	)
Third Party Defendant.	)

On Appeal from the United States District Court for the Middle District of Georgia

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BEFORE: TJOFLAT and KRAVITCH, Circuit Judges, and
* District Judge.*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appelate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

11TH CIRCUIT CLERK'S DATE FILING DATE STAMP ON COVER PAGE IS APRIL 27, 2007.

/S GERALD TJOFLAT
UNITED STATES CIRCUIT JUDGE

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*Honorable Hugh Lawson, United States District Judge for the Middle District of Georgia, sitting by designation.

Note: Original Signature on the Original Order by Judge Tjoflat.

Appendix E—1989 Recording Agreement of Petitioner Thompkins

EXCLUSIVE RECORDING AGREEMENT

This Agreement made and entered into as of this _____ day of May, 1989 by and between EFFECT RECORDS, a division of Skyywalker Records, INC., of 3050 Biscayne Blvd, Suite 307, Miami, FL 33137 ("COMPANY") and JEFFREY J. THOMPKINS and PATRICK WATLER collectively known as "THE POISON CLAN" _____ ("ARTIST")

In consideration of the mutual promises contained herein, it is hereby agreed as follows:

1.(a) COMPANY hereby engages ARTIST to record for COMPANY masters embodying the performances of ARTIST, and ARTIST hereby accepts such engagement and agrees to record masters embodying the performances of ARTIST exclusively for COMPANY during the term hereof and all extensions and renewals.

(b) The rights herein granted to COMPANY and the obligations of ARTIST shall be for the world ("Territory").

2. The term of this Agreement shall be for a period of one (1) year commencing on the date hereof ("Initial Period"). ARTIST hereby grants to COMPANY four (4) secutive separate options to extend the term for further periods of one (1) year each ("Option Periods"), each upon the same terms and conditions applicable to the Initial Period, except as otherwise hereinafter set forth. The Initial Period and every Option Period for which Company has

exercised its option are hereinafter sometimes referred to together as the "Term". Each option shall be automatically exercised, unless written notice to the contrary is sent to ARTIST at least fifteen (15) days prior to the date that the Term would otherwise expire.

3. During the Initial Period, ARTIST shall record masters the equivalent in playing time of one twelve (12) inch single, COMPANY and ARTIST hereby acknowledge that the masters listed on Schedule "A" annexed hereto and made a part hereof comprise the Twelve inch single required to be recorded during the Initial Period, with an option for one LP (hereinafter sometimes referred to as the "First LP"), and have been heretofore recorded by ARTIST. Said masters are herein and hereby owned by COMPANY pursuant to all of the terms and conditions of this Agreement, particularly Paragraph 20 hereof and said masters shall be deemed recorded and delivered hereunder during the Initial term.

4. (a) During the Term, ARTIST shall not perform for the purpose of making records for anyone other than COMPANY for distribution in the Territory and ARTIST shall not authorize the use of ARTIST's name, likeness, or other identification for the purpose of distributing, selling, advertising or exploiting records for anyone other than COMPANY in the Territory. It is agreed however, that individual members of ARTIST not to exceed two (2) may perform as instrumentalists, arrangers, producers or background singers on other recordings for other artists in a "sideman" capacity provided by COMPANY receives credit, in the form of "Courtesy of Skyywalker Records".

(b) ARTIST shall not perform any selection recorded hereunder for the purpose of making records for anyone other than COMPANY for distribution in the

Territory (i) for a period of five (5) years after the initial date of release of the respective record containing such selection or (ii) for a period of two (2) years after the expiration or other termination of this Agreement, whichever is later ("Re-recording Restriction").

(c) Should ARTIST make any sound recording during the Term for motion pictures, television, electrical transcriptions or any other medium or should ARTIST after the Term perform for any such purpose any selection recorded hereunder to which the Re-recording Restriction then applies, ARTIST will do so only pursuant to a written agreement prohibiting the use of such recordings, directly or indirectly, for record purposes in the Territory. ARTIST shall furnish to COMPANY a copy of the provisions of any such contract relating to the foregoing.

5. All masters recorded by ARTIST during the Term from the inception of the recording thereof and all reproductions derived therefrom, together with the performances embodied thereon, shall be the property of COMPANY for the world free from any claims whatsoever by ARTIST or any person deriving any rights or interests from ARTIST. Without limiting the generality of the foregoing, COMPANY and its designee(s) shall have the exclusive and unlimited right to all the results and proceeds of ARTIST's recording services rendered during the Term, including, but not limited to, the exclusive, unlimited and perpetual rights throughout the world:

(a) To manufacture, advertise, sell, lease, license, distribute or otherwise use or dispose of, in any or all fields of use by any method now or hereafter known, records embodying the masters recorded by ARTIST during the Term, all upon such terms and conditions as COMPANY

may elect, or at its discretion, to refrain therefrom;

(b) To use and publish and to permit others to use and publish ARTIST's name (including any professional name heretofore or hereafter adopted by ARTIST), photographs, likeness, and biographical material concerning ARTIST for advertising and trade purposes in connection with all masters recorded by ARTIST and all Pictures produced during the Term; ARTIST consent will be requested, such consent may not be unreasonably withheld.

(c) To obtain copyrights and renewals thereof in sound recordings (as distinguished from the musical compositions embodied thereon) recorded by ARTIST during the Term, in COMPANY's name as owner and employer-for-hire of such sound recordings;

(d) To release records derived from masters recorded by ARTIST during the Term under any name, trademark or label which COMPANY or its subsidiaries, affiliates or licensees may from time to time elect. COMPANY agrees that the initial United States release during the Term hereof of records solely embodying masters recorded hereunder shall be by a distributer or distributers selected by COMPANY at COMPANY's sole discretion.

(e) To perform such records publicly and to permit public performances thereof my means of radio broadcast, television or any other method now or hereafter known.

6. (a) ARTIST acknowledges that the sale of records is speculative and agrees that the judgment of COMPANY with regard to any matter affecting the sale, distribution or exploitation of such records shall be binding and conclusive upon ARTIST. Except as otherwise specifically set forth in

subparagraph 6(b) hereof, nothing contained in this Agreement shall obligate COMPANY to make, sell, license, or distribute records manufactured from masters delivered hereunder.

(b) Provided that ARTIST is not in breach of this Agreement, and if COMPANY is in receipt of completed, fully edited and mixed commercially satisfactory masters sufficient to comprise each newly-recorded required studio performances of material not previously recorded by ARTIST ready for COMPANY's manufacture of records therefrom, together with all materials therefor, COMPANY agrees to commercially release each LP recorded and delivered hereunder within one hundred and twenty (120) days following completion of Artists recording for COMPANY.

(c) It is understood and agreed that if COMPANY shall have failed to so release any such LP, ARTIST shall have the right to notify COMPANY in writing of COMPANY's such failure and of ARTIST's desire that the Term of this Agreement be terminated if COMPANY does not, within sixty (60) days after COMPANY receives such notice from ARTIST, commercially release the applicable LP in the World. It is specifically understood and agreed that if COMPANY shall fail to fulfill any such release commitment, COMPANY shall have no liability whatsoever to ARTIST and ARTIST's only remedy shall be to terminate the Term of this Agreement by written notice to COMPANY within fifteen (15) days following the expiration of such sixty (60) day period.

7. INTENTIONALLY DELETED

8. (a) (i) Except as otherwise provided in

subparagraph 8(a) (ii) hereof, COMPANY shall be solely responsible for and shall pay all recording costs, pressing and promotional costs incurred in the production and release of all masters subject to this Agreement. All such costs paid by COMPANY shall be deducted from any and all monies becoming payable to ARTIST under this or any other agreement between the parties hereto.

(ii) Notwithstanding the provisions of subparagraph 8(a) (i) hereof, in the event that COMPANY elects to require ARTIST to record and deliver the Additional Masters, or if COMPANY wishes to re-mix any of the masters delivered in connection with the First LP, all costs so paid by COMPANY shall be advances against and recoupable by COMPANY out of all royalties becoming payable to ARTIST pursuant to this or any other agreement between the parties hereto.

(b) COMPANY shall be solely responsible for and shall pay all monies becoming payable to ARTIST and all other parties rendering services or otherwise in respect of sales of recordings derived from masters subject to this Agreement.

9. (a) Each master recorded and delivered hereunder shall be produced by a producer selected by COMPANY. COMPANY shall be solely responsible for and shall pay all monies becoming payable to all producers. All such sums so paid by COMPANY shall be deducted form any and all monies otherwise payable to ARTIST under this or any other agreement between the parties hereto (excluding any publishing agreements with Companies affiliate Publishing Companies).

(b) As to any producers selected by COMPANY,

COMPANY shall pay said producer or producers a royalty negotiated between COMPANY and said producer and shall not effect the royalty otherwise payable to ARTIST under this or any other agreement between the parties hereto.

10. Conditioned upon ARTIST's full and faithful performance of all the material terms hereof, COMPANY shall pay ARTIST the following royalties in respect of records subject to this Agreement:

(a) Company shall credit Artist's Royalty Account pursuant to and in accordance with the following royalty schedule for records manufactured and sold in the United States:

RECORDING PERIODS	MINIMUM SIDES	ROYALTY RATES
Initial Period	One 12 inch & LP	5%
1st Option Period	One LP	5%
2nd Option Period	One LP	5%
3rd Option Period	One LP	5%
4th Option Period	One LP	5%

*Royalty Rate= Percentage times one-hundred (100%) percent of net records sold and for which Company has been paid times the retail price of records manufactured in the United States. This rate shall also apply to 7" Singles and LP's. (In the event Company's distributor is A&M Records or any other distributors that pays on the basis of ninety (90%) percent of retail, then company shall pay Artist on the basis of ninety (90%) percent of retail list price.)

(b) (i) With respect to retail sales outside the United States of all records derived from masters recorded and delivered during the Term, the royalty rate shall be based upon the U.S. rate and pro rated down at the percentage which COMPANY's royalty rate is reduced.

(ii) The royalty rate hereinabove set forth in subparagraph 10 (b)(i) shall be hereinafter referred to as the "Basic Foreign Rate".

(iii) Notwithstanding anything to the contrary contained herein, with respect to records sold in Brazil, Greece, Portugal, India, Kenya, Zambia, Zimbabwe, Nigeria and any other territory in which governmental or other authorities place limits on the royalty rates permissible for remittances to the United States in respect of records sold in such territory(ies), the royalty rate payable to ARTIST hereunder in respect of sales of records in such territory(ies) shall equal the lesser if (A) the Basic Foreign Rate or (B) the effective royalty rate permitted by such governmental or other authority for remittances of the United States less a royalty equivalent to two (2%) percent of the retail list price and such monies as Company of its licensees shall be required to pay all applicable union funds in respect of said sales.

(iv) Royalties in respect of sales of records outside the United States shall be computed in the same national currency as COMPANY is accounted to be its licensees and shall be paid to ARTIST at the same rate of exchange as COMPANY is paid. It is understood that such royalties will not be due and payable until payment thereof is received by or credited to COMPANY in the United States governmental regulations, royalties therefor shall not be credited to ARTIST's account during the continuance of such inability except that (i) if any accounting rendered to ARTIST hereunder during the continuance of such inability shows ARTIST's account to be in a credit position, COMPANY will, after ARTIST's request and at ARTIST's expense, if COMPANY is able to do so, deposit such royalties to ARTIST's credit in the applicable foreign currency in a foreign depository, or (ii) if the royalties not credited to ARTIST's account exceed the amount, if any, by which ARTIST's account is in debit position, then COMPANY will, after ARTIST request and at ARTIST's expense, and if company is able to do so, deposit such excess royalties to ARTIST's credit in the applicable foreign currency in a foreign depository. Deposit as aforesaid shall fulfill COMPANY's obligations under this Agreement as to record sales to which such royalty payments are applicable.

(c) With respect to records sold (i) through any direct mail or mail order distribution method, including, without limitations, record club distribution, (ii) by distribution through retail outlets in conjunction with special advertisements on radio or television or (iii) by any combination of the methods set forth above, the royalty payable in connection therewith shall be one-half (½) of COMPANY's net earned royalty receipts in respect of reported sales through such channels after COMPANY shall have first deducted all third party payments for which

COMPANY is responsible. No royalties shall be payable with respect to records given away as "bonus" or "free" records as a result of joining a record club or plan or of purchasing a required number of records or with respect to records received by members of any such club operation either in an introductory offer in connection with joining such club or upon recommending that another join such club operations.

(d) (i) With respect to mid-priced LPs, the royalty rate shall be two-thirds (2/3) of the Basic U.S. LP Rate or Basic Foreign Rate, as the case may be, provided that during the Term, COMPANY shall not release in the United States any such mid-priced LP comprised solely of masters delivered hereunder prior to nine (9) months following COMPANY's initial United States release of such LP as a full-priced record, unless ARTIST shall consent in writing.

(ii) With respect to budget LPs, the royalty rate shall be one-half (½) of the Basic U.S. LP Rate or Basic Foreign Rate, as the case may be, provided that during the Term, COMPANY shall not release in the United States any such budget LP comprised solely of masters delivered hereunder prior to eighteen (18) months following COMPANY's initial United States release of such LP as a full-priced record, unless ARTIST shall consent thereto.

(e) With respect to Eps, the royalty rate shall be three-fourths (3/4) of the Basic U.S. LP Rate or Basic Foreign Rate, as the case may be.

(f) Notwithstanding anything to the contrary contained in this Agreement, in the event that Company (or its licensee (s)) shall in any country(ies) of the Territory adopt a policy applicable to the majority of LPs in

COMPANY's (Or its licensee(s)') then current catalogue pursuant to which the retail list price of an LP is reduced subsequent to its initial release, then the royalty rates otherwise payable to ARTIST under this Agreement shall be reduced in the proportion that such reduced retail list price of the applicable LP bears to the retail list price of such LP as initially released in the applicable country.

(g) With respect to "compact-disc" LPs, the royalty rate shall be the Basic U.S. LP Rate or Basic Foreign Rate, as the case may be.

(h) In the event that COMPANY shall sell or license third parties to sell "records" via telephone, satellite, cable or other direct transmission to the consumer over wire or through the air, ARTIST shall be paid royalties with respect thereto at the Basic U.S. Singles Rate, Basic U.S. LP Rate or Basic Foreign Rate, as the case may be. For the purposes of calculating royalties payable in connection with such sales, the retail list price of such"records" shall be deemed to be the then-current retail list price of tape copies of such records and in the case of records which have no tape equivalent, the corresponding price of the disc (but in the United States, eighty-five (85%) percent of the then current retail list price of such tape copies or corresponding disc),and the packaging deduction for such sales shall be made in accordance with subparagraph 10(s)(iii) of this Agreement.

(i) The royalty rate payable for records sold to the United States government, its subdivisions, department and agencies, and to educational institutions and libraries shall be one-half (½) of the otherwise applicable basic U.S. rate and shall be based upon the retail list price (Post Exchange list price where applicable) of such records.

(j) The royalty rate payable for records sold as 'premiums" shall be one-half" (1 / 2) of the Basic U.S. Singles Rate, Basic U.S. LP Rate or Basic Foreign Rate, as the case may be, and the retail list price for such records shall be deemed to the COMPANY's actual sales price. It is understood that COMPANY shall not use ARTIST's name or likeness in connection with any such "premium" record as an endorsement of any product or service.

(k) The royalty rate payable for records sold in the form of pre-recorded tape (whether reel-to-reel or cartridge) or any other form (other than disc), shall be the applicable royalty rate otherwise payable, provided that if the retail list price of any record sold in pre-recorded tape form or any form other than disc) shall be less than the retail list price of the corresponding record in disc form, the royalty rate otherwise payable shall be reduced in the proportion that the retail list price of the applicable record in pre-recorded tape form (or such form other than disc) bears to the retail list price of such record in disc form.

(l) COMPANY shall have the right to license the masters to third parties for record use and/or all other types of use on a flat-fee basis. COMPANY shall credit ARTIST's royalty account with fifty (50%) percent of the net amount received by COMPANY under each such license after COMPANY shall have first deducted all third party payments for which COMPANY is responsible.

(m) As to records not consisting entirely of masters recorded and delivered hereunder, the royalty rate otherwise payable to ARTIST hereunder with respect to sales of any such record shall be protected by multiplying such royalty rate by a fraction, the numerator of which is the number of masters recorded and delivered hereunder embodied on such

record and the denominator of which is the total number of masters embodied thereon.

(n) As to masters embodying performances of ARTIST together with the performances of another artist or artists, the royalty rate otherwise payable hereunder with respect to sales of any record derived from any such master and the recording costs and/or advances otherwise payable by COMPANY hereunder with respect to any such master shall be prorated by multiplying such royalty rate or recording costs and/or advances by a fraction, the numerator of which is one and the denominator of which is the total number of artists whose performances are embodied on such master.

(o) COMPANY shall have the right to include or to license others to include any one or more of the masters in promotional records on which such masters and other recordings are included, which promotional records are designed for sale at a substantially lower price than the regular price of COMPANY's LPs. No royalties shall be payable on sales of such promotional records.

(p) No royalties shall be payable in respect of: (i) records given away or furnished on a "no-charge" basis to "one-stops", rack jobbers, distributors or dealers, whether or not affiliated with the COMPANY, provided that such records do not exceed 300 non-royalty bearing Singles out of every 1,000 Singles distributed and 200 non-royalty bearing LPs out of every 1,000 LPs distributed, and provided further that COMPANY shall have the right to exceed the aforesaid limitations for short term special promotions or marketing campaigns. The number of records distributed on a no-charge basis shall not, for any such short term promotion or campaign exceed an additional ten (10%) percent of the total number of records distributed. COMPANY shall use

reasonable efforts to notify ARTIST of any such short term special promotion or campaign, but COMPANY's failure to so shall not be a breach of this Agreement or in any matter affect COMPANY's right to distribute records on a non-royalty basis as aforesaid; (ii) records given away or sold at below stated wholesale prices for promotional purposes to disc jockeys, record reviewers, radio and television stations and networks, motion pictures companies, music publishers, COMPANY's employees, ARTIST, ARTIST or other customary recipients of promotional records or for use on transportation facilities; (iii) records sold as scrap, salvage, overstock or "cut-outs"; (iv) records sold below cost. No royalties shall be payable on any sales by COMPANY's licensees until payment has been received by or credited to COMPANY in the United States. This paragraph shall be governed by the agreement between COMPANY and it's distributor. In the event that distributor adopts a different policy as to the contents of this paragraph, then said distributor's policy shall prevail as between COMPANY and ARTIST.

(q) As to records sold at a discount to "one-stops", rack jobbers, distributors or dealers, whether or not affiliated with COMPANY, in lieu of the records given away or furnished on a "no-charge" basis as provided in sub-paragraph 10(p) (i) above, the applicable royalty rate otherwise payable hereunder with respect to such records shall be reduced in the proportion that said discount wholesale bears to the usual stated wholesale price, provided that said reduction in the applicable royalty rate does not exceed the percentage limitations set forth in subparagraph 10(p) (i) above.

(r) The royalty rates provided for in this Paragraph 10 shall be applied against the retail list price (less

COMPANY's container deductions, excise taxes, duties and other applicable taxes) for ninety (90%) percent of records sold which are paid for and not returned. The term for "retail list price" as used in this Agreement shall mean (i) for records sold in the United States, the manufacturer's suggested retail price in the United States and (ii) for records sold outside the United States, the manufacturer's suggested retail price in the country of manufacture or sale, as COMPANY is paid. In those countries where manufacturer's suggested retail price is not utilized or permitted, the generally accepted retail price shall be utilized. Notwithstanding the foregoing, (A) the retail list price for a "Disco-single" shall be deemed to be the retail lis price for a Single, except for Disco-Singles sold in the United States the retail list price therefor shall be deemed to be the lesser of one hundred fifty (150%) percent of the retail list price os such Disco-single and (B) the retail list price for a "compact-disc" shall be deemed to be the retail list price applicable to the initial release of the corresponding traditional 12" LP. To the extent that the "compact-disc" will be deemed to be the retail list price of a traditional 12" LP containing comparable repertoire. In computing sales, COMPANY shall have the right to deduct all returns made at any time and for any reason. In the event COMPANY is paid on the basis of 100% of the retail list price then ARTIST will be paid on the same basis.

(s) COMPANY's container deductions shall be a sum equal to (i) ten (10%) percent of the retail list price for records in disc form (other than "compact disc" records), (ii) twelve and one-half (12-½) percent of the retail list price for records in disc form in "double-fold" jackets or covers or in jackets which contain an insert or any other special elements, and (iii) twenty (20%) percent of the retail list price for pre-recorded tape, "compact-discs" and cartridge

boxes or containers, or any other form of package, container or box other than as described herein. In the event that the deduction for packaging charged by COMPANY's distributor is different then the amounts herein, then the amount deducted by COMPANY's distributor shall prevail.

11. Statements as to royalties payable hereunder shall be sent by COMPANY to ARTIST within sixty (60) days after the expiration of each calendar quarter for the preceding November 30. Concurrently with the rendition of each statement, COMPANY shall pay ARTIST all royalties shown to be due by such statement, after deducting all recording costs paid by COMPANY, all payments made on behalf of ARTIST, and all advances made to ARTIST prior to the rendition of the statement. No statements need bo rendered by COMPANY for any such quarterly period after the expiration of the Term hereof for which there are no sales of records derived from masters hereunder. All payments shall be made to the order of ARTIST and shall be sent to ARTIST at ARTIST's address first above written. COMPANY shall be entitled to maintain a single account with respect to all recordings subject to this or any other agreement between the parties hereto. COMPANY may maintain reserves: (I) with respect to LPs in disc form, each base reserve as initially established shall not exceed twenty (20%) percent of records shipped during the applicable accounting period and shall, at the end of the two (2) years from the date established, be reduced to five (5%) percent; (ii) with respect to LPs in tape form, each base reserve as initially established shall not exceed twenty-five (25%) percent of tapes shipped during the applicable accounting period and shall, at the end of two (2) years form the date established, be reduced to ten (10%) percent; and (iii) with respect to Singles, each base reserve as initially established shall not exceed thirty-five (35%) percent of records shipped

during the applicable accounting period and shall, at the end of two (2) years from the date established, be reduced to ten (10%) percent. COMPANY shall fully liquidate each base reserve within four (4) years from the date that such base reserve was established. At such time as a reserve is liquidated, it shall be deemed to be a sale in the period in which it was liquidated. ARTIST shall be deemed to have consented to all accountings rendered by COMPANY hereunder and said accountings shall be binding upon ARTIST and not subject to any objection by ARTIST for any reason unless specific objection, in writing, stating the basis thereof, is given to COMPANY within one (1) year after the date rendered, and after such written objection, unless suit is instituted within one (1) year after the date upon which COMPANY notifies ARTIST that it denies the validity of the objection. In the event COMPANY's distributor shall pay COMPANY on a semi-annual basis, the COMPANY shall pay ARTIST on the same basis as COMPANY is paid.

12. ARTIST shall have the right at ARTIST's sole cost and expense to appoint a Certified Public Accountant who is not then currently engaged in an outstanding audit of COMPANY to examine COMPANY's books and records as same pertain to sales of records subject hereto as to which royalties are payable hereunder, provided that any such examination shall be for a reasonable duration, shall take place at COMPANY's offices during normal business hours on reasonable prior written notice and shall not occur more than once in any calendar year.

13. (a) All notices to ARTIST may be served upon a principal or officer of ARTIST personally, by prepaid telegram, or by depositing the same, postage prepaid, in any mail box, chute, or other receptacle authorized by the United States Postal Service for mail, addressed to ARTIST at

ARTIST's address first above written, with a courtesy copy to:

(b) All notices to COMPANY shall be in writing and shall be sent postage prepaid by registered or certified mail, return receipt requested, and addressed to COMPANY's address first above written with a simultaneous copy sent in the same manner to:

ALLEN L. JACOBI, ESQ.
1313 N. E. 125th Street
North Miami, FL 33161

14. (a) All musical compositions or material recorded pursuant to this Agreement which are written or composed, in whole or in part by ARTIST or any producer of the masters subject hereto, or which are owned or controlled, directly and indirectly, in whole or in part, By ARTIST and/or Artist or any producer of the masters subject hereto (herein called "Controlled Compositions") shall be and are hereby licensed to COMPANY for the United States at a royalty per selection equal to seventy-five (75%) percent of the minimum statutory per selection rate (without regard to playing time) effective on the earlier of (I) the date such masters are required to be delivered hereunder or (ii) the date such masters are delivered to COMPANY hereunder. The aforesaid seventy-five (75%) percent per selection rate shall hereinafter sometimes be referred to as the "Per Selection Rate." Notwithstanding the foregoing, the maximum aggregate mechanical royalty rate which COMPANY shall be required to pay in respect of any Single, Disco-single or LP hereunder, regardless of the total number of all compositions contained therein, shall not exceed two (2) times, two (2) times, and ten (10) times the Per Selection Rate, respectively and in respect of any EP hereunder

regardless of the total number of all compositions contained thereon, shall not exceed the per Selection Rate times the total number of masters contained therein. In this connection, it is specifically understood that in the event that any Single, Disco-Single, EP or LP contains other compositions in addition to the Controlled Compositions and the aggregate mechanical royalty rate provided in this Paragraph 14, the aggregate rate for the Controlled Compositions contained thereon shall be reduced by the aforesaid excess over said applicable rate. Additionally, COMPANY shall have the right with respect to any Single, Disco-Single, EP or LP, the aggregate mechanical royalty rate for which exceeds the applicable provided in this Paragraph 14 to deduct such excess payable thereon form any and all monies payable to ARTIST pursuant to this or any other agreement between the parties hereto. All mechanical royalties payable hereunder shall be paid on the basis of net records sold hereunder for which royalties are payable to ARTIST pursuant to this Agreement. Notwithstanding anything to the contrary contained herein, mechanical royalties payable in respect of Controlled Compositions for sales of records for any other use other than as described in subparagraphs 10(a), (e), (g) and (k) hereof shall be seventy-five (75%) percent of the otherwise applicable Per Selection Rate. Controlled Compositions which are arranged versions of any musical compositions in the public domain, when furnished by ARTIST for recording hereunder, shall be free of administration of copyright in any Controlled Composition shall be made subject to the provisions hereof and inconsistencies between the terms of this Agreement and mechanical licensees issues to and accepted by COMPANY shall be determined by the terms of this Agreement. If any Single, Disco-Single, EP or LP contains other compositions in addition to the Controlled Compositions, ARTIST will obtain for COMPANY's benefit mechanical licenses

covering such composition on the same terms and conditions applicable to Controlled Compositions pursuant to this Paragraph 14.

(b) In respect of all Controlled Compositions performed in Pictures, COMPANY is hereby granted an irrevocable perpetual worldwide license to record and reproduce such Compositions in such Pictures and to distribute and perform such Pictures including, but not limited to, all Video shows thereof, and to authorize others to do so. COMPANY will not be required to make any payment in connection with those uses, and that license shall apply whether or not COMPANY receives any payment in connection with those Pictures. Simultaneously with ARTIST's submission to COMPANY of the information required pursuant to subparagraph 21(c)(I) hereof, ARTIST shall furnish COMPANY with a written acknowledgment from the person(s) or entity(ies) controlling the copyright in each non-Controlled Compositions to be embodied on any Picture confirming the terms upon which said person(s) or entity(ies) to forthwith issue to COMPANY (and its designees) licenses containing said terms and such other terms and conditions as COMPANY (or its designees) may require. Royalties in connection with licenses for the use of non-Controlled Compositions pertaining to Pictures and Video shows are included in the royalties set forth in subparagraph 21(d) hereof, as described in subparagraph 21(d)(ii). If the copyright in any Controlled Composition is owned or controlled by anyone else, ARTIST will cause that person, firm or corporation to grant COMPANY the same rights described in this Paragraph 14, on the same terms.

15. (a) In the event that ARTIST for any reason fails to timely fulfill any of its production and delivery commitments hereunder in accordance with all of the terms

and conditions of the Agreement, then, in addition to any other rights or remedies which COMPANY may have, COMPANY shall have the right, upon written notice to ARTIST at any time prior to the expiration of the then current Period, (i) to terminate this Agreement without further obligation to ARTIST as to unrecorded or undelivered masters, (ii) to reduce the minimum number of masters required to be recorded and delivered during the then current Period to the number which have been timely recorded and delivered during such Period, or (iii) such default plus one hundred and fifty (150) days with the times for the exercise by COMPANY of its options to extend the Term and the dates of commencement of subsequent Option Periods deemed extended accordingly. It is specifically understood that COMPANY may exercise any of all of its rights pursuant to subparagraphs 15(a) (i), (ii) and (iii) hereof at any time(s) prior to the date the Term would otherwise expire. COMPANY's obligations hereunder shall be suspended for the duration of any such default. The provisions of this subparagraph shall not result in an extension of the Term for a period in excess of the period permitted by applicable law, if any, for the enforcement of personal services agreements.

(b) Intentionally Omitted

(c) COMPANY reserves the right, at its election, to suspend the operation of this Agreement for the duration of any of the following contingencies if by reason of any such contingency, it is materially hampered in the performance of its obligations under this Agreement or its normal business operations are delayed or become impossible or commercially impracticable: Act of God, fire, catastrophe, labor disagreement, acts of government, its agencies or officers, any order, regulation, ruling or action of any labor

union or association of artists, musicians, composers or employees affecting COMPANY or the industry in which it is engaged, delays in the delivery of materials and supplies, or any other cause beyond COMPANY's control. Any such suspension due to a labor controversy which involves only COMPANY shall be limited to a period of six (6) months.

(d) If ARTIST's voice or voices should be materially or permanently impaired, then in addition to any other rights or remedies which COMPANY may have, COMPANY shall have the right, upon written notice to ARTIST, to terminate this Agreement and shall thereby be relieved of any liability in connection with undelivered masters.

16. ARTIST expressly acknowledges that ARTIST's services hereunder are of a special, unique and intellectual character which gives them peculiar value, and that in the event of a breach or threatened breach by ARTIST of any term, condition or covenant hereof, COMPANY will be caused immediate irreparable injury. ARTIST expressly agrees that COMPANY shall be entitled to seek injunctive and other equitable relief, as permitted by law, to prevent a breach or threatened breach of this Agreement, or any portion thereof, by ARTIST which relief shall be in addition to any other rights or remedies, for damages or otherwise available to COMPANY.

17. (a) ARTIST warrants and represents that neither ARTIST is not under any disability, restriction, or prohibition, whether contractual or otherwise, with respect to ARTIST's right to execute this Agreement or ARTIST's right to perform its terms and conditions. Without limiting the foregoing, ARTIST specifically warrants and represents that no prior obligations, contracts or agreements of any kind

undertaken or entered into by ARTIST, will interfere in any manner with the complete performance of this Agreement by COMPANY, ARTIST or with ARTIST's right to record any and all selections hereunder. ARTIST warrants and represents that there are now in existence no prior unreleased masters embodying ARTIST's performances.

(b) ARTIST warrants and represents that no materials, or any use thereof, will violate any law or infringe upon or violate the rights of any third party. "Materials", as used in this subparagraph 17(b) shall include: (i) all musical compositions and other material contained on masters subject hereto, (ii) each name used by ARTIST, in connection with masters recorded hereunder, and (iii) all other materials, ideas, other intellectual properties, or elements furnished or selected by ARTIST and contained in or used in connection with any masters recorded hereunder or the packaging, sale, distribution, advertising, publicizing or other exploitation thereof.

(c) ARTIST agrees to and does hereby indemnify, save and hold COMPANY harmless from any and all loss and damage (including court costs and reasonable attorneys' fees) arising out of, connected with or as a result of any inconsistency with, failure or, or breach or threatened breach by ARTIST of any warranty, representation, agreement, undertaking or covenant contained in this Agreement including, without limitation, any claim by any third party in connection with the foregoing. In addition to any other rights or remedies COMPANY may have by reason of any such inconsistency, failure, breach, threatened breach or claim, ARTIST shall reimburse COMPANY, on demand, for any payment made by COMPANY at any time after the date hereof with respect to any loss, damage or liability resulting therefrom and in addition thereto COMPANY shall have the

right to deduct from any and all monies otherwise payable to ARTIST under this or any other agreement between the parties hereto a sum(s) equal to such loss, and reasonable attorneys' fees). COMPANY shall give ARTIST notice of any third party claim to which the foregoing indemnity applies and ARTIST shall have the right to participate in the defense of any such claim through counsel of ARTIST's own choice and at ARTIST's expense. Pending the determination of any such claim, COMPANY may withhold payment of all monies under this or any other agreement between the parties hereto in any amount consistent with such claim.

18. Wherever in this Agreement ARTIST's approval or consent is required, such approval or consent shall not be unreasonable withheld. COMPANY may require ARTIST to formally give or withhold such approval or consent by giving ARTIST written notice requesting same and by furnishing ARTIST with the information or material in respect of which such approval or consent is sought. ARTIST shall give COMPANY written notice of approval or disapproval within five (5) days after such notice. ARTIST shall not hinder not delay the scheduled release of any record hereunder. In the event of disapproval or no consent, the reasons therefor shall be stated. Failure to give such notice to COMPANY as aforesaid shall be deemed to be consent or approval.

19. During the Term, ARTIST warrants and represents that ARTIST shall become and remain a member in good standing of any labor unions with which the COMPANY may at any time have agreements lawfully requiring such union membership, including, but not limited to, the American Federation of Musicians and the American Federation of COMPANY's (or its designees's) name as employer-for-hire such copyrights and all renewals and extensions thereof, perpetually and throughout the Territory.

(b) ARTIST will facilitate the Masters to COMPANY at its offices in Miami, Florida not later than simultaneously with the execution of this Agreement, unless said masters are already in the possession of COMPANY.

(c) The Masters will be deemed to have been recorded under this Agreement during the Initial Period of the Term of this Agreement.

(d) ARTIST hereby warrants and represents:

(i) Intentionally Deleted

(ii) No records have been manufactured from the Masters by ARTIST or any other person, firm or corporation for distribution in the Territory, and neither ARTIST nor any other person, firm or corporation has or shall have the right to distribute, market and /or sell any records embodying the Masters in Territory, and none of the musical compositions performed in the Masters have been performed by ARTIST for the making of any other master recordings, other than those records already pressed.

(iii) ARTIST has not, nor has any other person, sold or assigned to any other party or otherwise disposed of any right, title or interest in or to the Masters.

(iv) (1) Each person who rendered any service in connection with, or who otherwise contributed in any way to the making of the Masters, or who granted to ARTIST any of the rights referred to in this Agreement, had the full right, power, and authority to do so, and was not bound by any agreement which would restrict such person from rendering such services or granting such rights.

(2) All recording costs and expenses with respect to the making of the Masters have been paid in full.

(3) All necessary licenses for the recording of the compositions performed in the Masters have been obtained from the copyright owners, and all monies payable under such licenses or otherwise by reason of such recording have been paid. The foregoing does not apply to any monies payable to such copyright owners in connection with the manufacture or sale or records derived from the Masters.

(4) All the Masters were made in accordance with the rules and regulations of the American Federation of Musicians ("AFM"), the American Federation of Television and Radio Artists ("AFTRA") and all other unions having jurisdiction.

(v) COMPANY shall have the sole and exclusive right to manufacture, advertise, distribute, sell and otherwise exploit and deal throughout the Territory in the Masters and records and other reproductions derived therefrom, free from any liability or obligation to make and payments therefor, except as expressly provided in this Agreement.

(vi) ARTIST will execute, acknowledge and deliver to COMPANY such further instruments and documents, and will otherwise cooperate with COMPANY as COMPANY shall request at any time, for the purpose of establishing or evidencing the rights granted to COMPANY herein, or otherwise to implement the intent of this Paragraph 20 COMPANY shall give ARTIST five day notice to sign such documentation and in the event that after said five days the documents are not signed the COMPANY may sign such documents in ARTIST's name and make appropriate

disposition of them.

(e) It is understood and agreed that all of the provisions of this Paragraph 20 are of the essence of this Agreement.

21. (a) In addition to ARTIST's recording and ARTIST's recording commitments as set forth in Paragraph 3 of this Agreement, ARTIST shall comply with requests, if any, made by COMPANY in connection with the production of Pictures. In this connection, ARTIST shall appear on dates and at places requested by COMPANY for the filming, taping or other fixation of audio-visual recordings. ARTIST shall perform services with respect thereto as COMPANY deems desirable in a timely and first-class manner. ARTIST acknowledges that the production of Pictures, involves matters of judgment with respect to art and taste, which judgment shall be exercised by COMPANY and COMPANY's decisions with respect thereto shall be final. COMPANY will endeavor to consult with ARTIST as to the Production of pictures.

(b) (i) Each picture produced during the Term of this Agreement shall be owned by COMPANY (including the worldwide copyrights therein and thereto and all extensions and renewals thereof) to the same extent as COMPANY's rights in master recordings made under this Agreement.

(ii) COMPANY will have the unlimited right to manufacture Videoshows of the Picture to rent, sell, distribute, transfer, sublicense or otherwise deal in such Videoshows under any trademarks, tradenames and labels; to exploit the Picture by any means now or hereafter known or developed; or to refrain from any such exploitation, throughout the world.

(c) (i) COMPANY agrees to advance all costs actually incurred in the production of Pictures made by COMPANY. COMPANY shall submit to ARTIST for ARTIST's reasonable approval in writing, the following information: (i) the musical compositions and other material to be embodied thereon; (ii) the general concept therefor and (iii) the producer, director, and any other key personnel therefor. Following COMPANY's receipt of ARTIST's approval of said information, COMPANY shall commence production of the Picture.

All sums paid by COMPANY in connection with each Picture shall be an advance against and recoupable by COMPANY out of all royalties becoming payable to ARTIST pursuant to this or any other agreement between the parties hereto.

(ii) Each of the following sums, if any, paid by COMPANY in connection with each Picture shall be an advance against and recoupable by COMPANY out of all royalties becoming payable to ARTIST pursuant to this or any other agreement between the parties hereto.

(A) All expenses incurred by COMPANY in connection with the preparation and production of the Picture and the conversion of the Picture to Video Masters that are made to serve as prototypes for the duplication of the Videoshows of the Picture;

(B) All of COMPANY's direct out-of-pocket costs (such as for rights, artists (including ARTIST), other personnel, facilities, materials, services, and the use of equipment) in connection with all steps in the production of the Picture and the process leading to and including the production of such Video Masters (including, but not limited

to, packaging costs and the costs of making and delivering duplicate copies of such Video Masters); and

(C) If in connection therewith COMPANY furnishes any of its own facilities, materials, services or equipment for which COMPANY has a standard rate, the amount of such standard rate or if there is no standard rate, the market value for the services or thing furnished.

(iii) All sums that COMPANY in its sole discretion deems necessary or advisable to pay in connection with the production of Pictures and the exploitation of COMPANY's rights therein in order to clear rights or to make any contractual payments that are due or may become due on the part of COMPANY, to ARTIST, ARTIST or any other person, firm or corporation by virtue of the exploitation of COMPANY's rights therein, in order to avoid, satisfy or make unnecessary any claims or demands by any person, firm or corporation claiming the right to payment therefor, including, but not limited to, any payment to an actual or alleged copyright owned, patent owner, union, union-related trust fund, pension plan or other entity, and any payment for an actual or alleged re-run fee, residual, royalty, license fee or otherwise shall constitute advances against and recoupable out of all royalties becoming payable to you pursuant to this or any other agreement between the parties hereto. No payment pursuant to this subparagraph 21(c) (iii) shall constitute a waiver of any of ARTIST's express or implied warranties and representations.

(d) (i) Conditioned upon ARTIST full and faithful performance of all of the terms and conditions of this Agreement, COMPANY shall pay ARTIST royalties equal to fifty (50%) percent of COMPANY's Video Net Receipts with respect to COMPANY's exploitation of Pictures subject

to this Agreement. Monies earned and received by COMPANY from any licensee (rather than monies earned and received by the licensee) in respect of exploitation of Pictures shall be included in the computation of Video Net Receipts.

(ii) The royalties provided in subparagraph 21(d)(I) include any royalty obligations COMPANY may have to any other person, firm or corporation who supplied services or rights used in connection with Pictures, including, without limitation, producers, directors, extras, and music publishers, and any such royalties shall be deducted from the royalties otherwise payable to ARTIST.

(iii) With respect to audiovisual material embodying Pictures made hereunder together with other audiovisual material, royalties payable to ARTIST shall be computed by multiplying the royalties otherwise applicable by a fraction, the numerator of which is the amount of Pictures made hereunder and the denominator of which is the total playing time of such audiovisual material.

(iv) As to Pictures embodying performances of ARTIST together with the performances of another artist or artists, the royalties otherwise payable hereunder shall be prorated by multiplying such royalties by a fraction, the numerator of which is one and the denominator of which is the total number of artists whose performances are embodied on such Pictures.

(e) COMPANY shall have the right to use and allow others to use each Picture for advertising and promotional purposes with no payment to ARTIST. As used herein, "advertising and promotional purposes" shall mean all uses for which COMPANY received no monetary consideration

from licensees in excess of a reasonable amount as legal fees, administrative costs or similar type payments and as reimbursement for transaction costs incurred by COMPANY in connection with such uses, such as tape, duplication costs, shipping, handing and insurance costs.

(f) (i) During the Term of this Agreement, no person, firm or corporation other than COMPANY will be authorized to make, sell, broadcast or otherwise exploit audio-visual materials unless: (A) ARTIST first notifies COMPANY of all the material terms and conditions of the proposed agreement pursuant to which the audio-visual materials is to be made, sold, broadcast or otherwise exploited, including, but not limited to, the titles of the compositions covered by the purposed agreement, the format to be used, the manner of exploitation proposed and the indentities of all proposed parties to the agreement, and (B) ARTIST offers to enter into an agreement with COMPANY containing the same terms and conditions described in such notice and otherwise in the same form as this Agreement, but with payments to ARTIST that are ninety (90%) percent of the payments to ARTIST in such proposed agreement. If COMPANY does not accept ARTIST's offer within forty-five (45) days after COMPANY receipt of same, ARTIST may then enter into that proposed agreement with the same parties mentioned in such notice, subject to subparagraph 21(f) (ii) hereof and provided that such agreement is consummated with those parties within thirty (30) days after the end of that sixty (60) day period upon the same financial terms and conditions set forth in ARTIST's notice and offer to COMPANY. If that agreement is not consummated within the latter thirty (30) day period, no party except COMPANY will be authorized to make, sell, broadcast or otherwise exploit such audiovisual materials unless ARTIST first offers to enter into an agreement with COMPANY as

provided in the first sentence of this subparagraph 21(f). COMPANY will not be required, as a condition of accepting and offer made to COMPANY pursuant to this subparagraph 21(f), to agree to any terms or conditions which cannot be fulfilled by COMPANY as readily as by any other party (for example, but without limitation, the employment of a particular producer or director).

(ii) If COMPANY does not accept an offer made to it pursuant to this subparagraph 21(f), such nonacceptance shall not be considered a waiver of any of COMPANY's rights pursuant to this Agreement. Such rights include, without limitation, the right to prevent authorizing any use of masters owned by or exclusively licensed to COMPANY unless COMPANY so agrees. ARTIST shall not act in contravention of such rights.

(g) In all other respects (e.g., the times for accountings to be rendered, and warranties and representations made by ARTIST) Pictures and Video Masters shall be governed by the same terms and conditions as are applicable to masters subject to this Agreement.

22. Intentionally Deleted.

23. COMPANY shall prepare the artwork for the album covers used in connection with the releases hereunder in the United States, during the Term of this Agreement, of each newly-recorded LP required to be recorded and delivered hereunder (hereinafter, the "Artwork"), upon prior written notice to COMPANY and only upon all of the following conditions:

(a) Before preparation and the incurring of any expenses with connection with the album artwork, ARTIST

may discuss completely with a representation of COMPANY's art department, the proposed artwork to be produced by COMPANY, all of which shall be subject to the decision of COMPANY's are department. COMPANY will endeavor to consult with ARTIST as to the album artwork.

(b) (i) COMPANY will deliver all such Artwork prepared by COMPANY to ARTIST for ARTIST's reasonable approval, prior to the printing of said album cover.

24. Intentionally Deleted.

25. For the purposes of this Agreement, the following definitions shall apply:

(a) "Master" - The equivalent of a seven (7") inch 45 rpm single-sided recording of not less than 3-1/2 minutes of playing time intended for use in the manufacture and sale of records.

(b) "Single" - A seven (7") inch 45 rpm double-sided record embodying thereon two (2) masters. A "Disco-single" is a twelve (12") inch double-sided record embodying thereon not more than four (4) masters.

(c) "EP" - A double-sided record embodying thereon either five (5) masters of six (6) masters.

(d) "LP" - A twelve (12") inch 33-1/3 rpm double-sided long-playing record of not less than 35 minutes of playing time. Multiple sets which consist of more than one (1) LP intended to be released, packaged and sold together for a single overall price, shall be deemed to be the equivalent of one (1) LP for the

purpose of this Agreement, but shall not be recorded or delivered hereunder without COMPANY's prior written consent.

(e) "Records", "phonograph records", "recordings" and "sound recording" - All forms of recording and reproduction by which sound may be recorded now known or which may hereafter become known, manufactured or sold primarily for home use, juke box use, or use on or in means of transportation, including, without limiting the foregoing, magnetic recording tape, film, electronic video recordings and any other medium or device for the production of artistic performances manufactured or sold primarily for home use, juke box use or use on or in means of transportation, whether embodying (I) sound alone (ii) sound synchronized with visual images, e.g. "Sight and sound" devices.

(f) "Delivery", "deliver" or "delivered" - The actual receipt by COMPANY of completed, fully mixed, leadered and edited masters comprising each LP, commercially satisfactory to COMPANY and ready for COMPANY's manufacture of records, together with all materials, consents, approvals, licenses and permissions.

(g) "Recording Costs" - Wages, fees, advances and payments of any nature to or in respect of all musicians, vocalists, conductors, arrangers, orchestrators, engineers, producers, copyists, etc.; payments to a trustee or fund based on wages to the extent required by any agreement between COMPANY and any labor organization or trustee; all studio, tape, editing, mixing, re-mixing, mastering and engineering costs; all costs of travel, per diems, rehearsal halls, non-studio facilities and equipment, dubdown, rental and transportation of instruments; all costs occasioned by the cancellation of any scheduled recording session; and all other

costs and expenses incurred in producing the master recordings hereunder which are then customarily recognized as recording costs in the recording industry.

(h) "mid-priced LP" - an LP which bears a suggested retail list price in the applicable country of the Territory of at least sixty-seven (67%) percent but not more than eighty (80%) percent of the suggested retail list price of the majority of COMPANY's or COMPANY's licensee's as applicable, then-current newly-released LPs.

(i) "budget LP" - an LP which bears a suggested retail list price in the applicable country of the Territory or less than sixty-seven (67%) percent of the suggested retail list price of the majority of COMPANY's or COMPANY's licensee's, as applicable, then-current newly-released LPs.

(j) "Pictures" - motion pictures and other audiovisual works that have a soundtrack substantially featuring performances of ARTIST.

(k) "Vidoeshows" - Videocassetts, Videodiscs or any other devices, now or hereafter known or developed, that enable the Picture to be perceived visually, with or without sound, when used in combination with or as part of a place of electronic, mechanical or other apparatus.

(l) "Videodisc" - a disc-type Videoshow that enable the Picture to be perceived visually, with or without sound, through a television-type playback system or device.

(m) "Videocassette" - A Videoshow other than Videodisc (e.g., a Videoshow in the form of pre-recorded tape).

(n) "Video Masters" - master Videoshows.

(o) "Video Net Receipts" - monies earned and received by COMPANY from exploitation of Pictures less a twenty (20%) percent gross distribution fee, and less any out-of-pocket expenses, copyright, union and other third party payments, taxes and adjustments borne by COMPANY in connection with such exploitation and collection and receipt by COMPANY of such monies.

(p) "any other agreement between the parties hereto" - any agreements between COMPANY on the one part, and ARTIST (or any other entity furnishing ARTIST's recordings or services) or ARTIST, on the other part, pertaining to ARTIST's recording services or recordings.

26. COMPANY shall have the right to assign this Agreement in whole or in part.

27. This Agreement sets forth the entire agreement between the parties with respect to the subject matter hereof. No modification, amendment, waiver, termination or discharge of this Agreement shall be binding upon COMPANY unless confirmed by a written instrument signed by an officer of COMPANY. A waiver by COMPANY of any term or condition of this Agreement in any instance shall not be deemed or construed as a waiver of such term or condition for the future, or of any subsequent breach thereof. All of COMPANY's rights, options and remedies in this Agreement shall be cumulative and none of them shall be in limitation of any remedy, option or right available to COMPANY. Should any provision of this Agreement be adjudicated by a court of competent jurisdiction as void, invalid or inoperative, such decision shall not affect any other provision hereof, and the remainder of this Agreement

shall be effective as though such void, invalid or inoperative provision had not been contained herein. It is agreed that all accountings and payments required herein, and all grants made herein, shall survive and continue beyond the expiration or earlier termination of this Agreement. No breach of this Agreement by COMPANY shall be deemed material unless within thirty (30) days after ARTIST learns of such breach, ARTIST serves written notice thereof on COMPANY specifying the nature thereof and COMPANY fails to cure such breach, if any, within sixty (60) days (except thirty (30) days if such alleged breach is the payment of monies hereunder) after receipt of such notice.

28. This Agreement shall be deemed to have been made in the State of Florida and its validity, construction, performance and breach shall be governed by the laws of the State of Florida applicable to agreements made and to be wholly performed therein. ARTIST agrees to submit itself to the jurisdiction of the Federal or State courts located in Miami in any action which may rise out of this agreement and said courts shall have exclusive jurisdiction over all disputes between COMPANY and ARTIST pertaining to this Agreement and all matters related hereto. In this regard, any process in any action or proceeding commenced in the courts of the disagreement under this Agreement may, among other methods, be served upon ARTIST by delivering or mailing the same, via registered or certified mail, addressed to ARTIST; any such delivery or mail service shall be deemed to have the same force and effect as personal service within the State of Florida. Nothing contained herein shall constitute a waiver of any other remedies available to COMPANY. Nothing contained in this Paragraph 28 shall preclude COMPANY from joining ARTIST in an action brought by a third party against COMPANY in any jurisdiction, although COMPANY's failure to join ARTIST

in any such action in one instance shall not constitute a waiver of any COMPANY's rights with respect thereto, or with respect to any subsequent action brought bu a third party against COMPANY.

29. ARTIST hereby grants to COMPANY and its licenses the exclusive right, throughout the world, to use and authorize the use of ARTIST's name, portraits, pictures, likeness, and biographical material, either alone or in conjunction with other elements, in connection with the sale, lease, licensing or other disposition of merchandising rights. For the rights granted by ARTIST to COMPANY in this paragraph, COMPANY shall pay ARTIST a royalty of fifty (50%) percent of COMPANY's net royalty receipts derived from the exploitation of such rights, after deducting all costs and third party payments relating thereto; and such royalty shall be accounted to ARTIST in the manner otherwise provided herein. Relative to any and all activities conducted and contemplated by this paragraph, COMPANY agrees to regularly and reasonably inform ARTIST, in writing, of progress and current status of all such activities. COMPANY agrees to submit to ARTIST, within thirty (30) days of execution, copies of all contracts entered into by COMPANY relative to those activities provided for in this paragraph.

30. This Agreement shall not become effective until executed by all parties.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first above written.

SKYYWALKER RECORDS

BY: /s

BY: /s
JEFFREY J. THOMPKINS (Artist)

SS# 263-47-4728
DOB September 14, 1972

BY: /s
BRENDA THOMPKINS (Guardian)

BY: /s
PATRICK WATLER (Artist)

SS# 065-62-1161
DOB July 17, 1971

BY: /s
ANNIE WATLER (Guardian)

Appendix F—1992 Addendum to the 1989 Recording Agreement of Petitioner Thompkins

Addendum to Exclusive Recording Contract entered into in May, 1989 Between Effect Records, Inc. And Luke Records, Inc. And Jeffery J. Thompkins (p/k/a JT Money) also known as the Poison Clan ("Artist"). This addendum is dated this _____ day of February, 1992.

The original Exclusive Recording Agreement is amended to provide the following:

1.No producer will receive any writer's or publishers royalties or share in any writer's royalties unless said producer actually writes the music.

2.Luke and Effect will use their best efforts to obtain the input of Artist on any promotional items spent on behalf of Artist and will attempt to obtain artists' approval, which shall not be unreasonably withheld, on a promotional budget prior to portion of Artist's album soon to be released and all future albums.

3.Luke and Effect will use their best efforts to notify Artists of the optional periods in the contract.

4.Artist shall receive a recoupable advance of $5,000.00 upon the completion of each album.

5.Artist will receive the entire royalty in the contract even if additional artists are added to the group.

6. Artist hereby sells, transfers and assigns to Pac Jam Publishing or such other company designated by Luke or Effect an undivided 50% of the publishing interest, in all

compositions of artist including without limitation,the copyrights therein and all renewal and or extensions throughout the world and all claims and causes of actions related to the compositions, including without limitation, the words, titles, and music of the compositions and each and every arrangement, adaptation and version thereof. Artist will execute and deliver to Luke and Effect or its successors and assigns or designees such instruments of transfer and other documents regarding the rights of Luke and Effect or their designees in the compositions which are reasonably necessary to carry out the purposes of this agreement including without limitation the songwriters agreement which is attached hereto and Luke and Effect or their designees may sign such documents in artist's name or the name of any controlled songwriter and make appropriate disposition of them. Artist irrevocably appoints Luke and Effect or their designees irrevocably for the term of the copyrights and renewal periods its lawful attorney to do all acts deemed necessary for Artist. All copyrights will be re-registered in the name of Artist and Luke and effect or their designees and any other additional parties which are appropriate.

7.All prior agreements entered into by Artist are hereby ratified and affirmed by Artist.

Luke Records, Inc.
and Effect Records, Inc.

By:_____
Luther R. Campbell, President of
both corporations

/s_____
Jeffery Thompkins
("Artist")

Appendix G---11 U.S.C. § 363

11 U.S.C. § 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless--

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease--

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then–

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended--

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless--

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only--

(1) in accordance with applicable nonbankruptcy law that governs the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust; and

(2) to the extent not inconsistent with any relief granted

under subsection (c), (d), (e), or (f) of section 362.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if–

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if--

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and

expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(*l*) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appea

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property

sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.

(p) In any hearing under this section–

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

Appendix H—11 U.S.C. § 365

11 U.S.C. § 365. Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee–

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the

debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to--

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance–

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

[**(4)** Repealed. Pub.L. 109-8, Title III, § 328(a)(2)(C), Apr. 20, 2005, 119 Stat. 100]

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejecte

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The

court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4)(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of–

(i) the date that is 120 days after the date of the order for relief; or

(ii) the date of the entry of an order confirming a plan.

(B)(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for ca

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

(5) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household

purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

[**(6) to (9)** Repealed. Pub.L. 109-8, Title III, § 328(a)(3)(A), Apr. 20, 2005, 119 Stat. 100]

[**(10)** Redesignated (5)]

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on--

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment

of rights or delegation of duties, if--

(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if--

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that

terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease--

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title--

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title--

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1)(A) If the trustee rejects an unexpired lease of real

property under which the debtor is the lessor and—

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use,

exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2)(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and--

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession--

(A) such purchaser shall continue to make all payments due under such contract, but may, [FN1] offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(*l*) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect--

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for--

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract–

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive–

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall--

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall--

(A) to the extent provided in such contract or any agreement supplementary to such contract--

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(*o*) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

(p)(1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated.

(2)(A) If the debtor in a case under chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of any outstanding default on terms set by the contract.

(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.

(C) The stay under section 362 and the injunction under section 524(a) (2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.

(3) In a case under chapter 11 in which the debtor is an individual and in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.